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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether the First Amendment rights of corporate employees and stockholders, and the First and Fifth Amendment rights of labor unions, are violated by provisions of the Federal Election Campaign Act construed by the lower court so as to

1) limit labor union federal election spending to moneys donated by members but allow corporations to spend both moneys donated by their stockholders and political payments pressured from their vulnerable career employees;

2) authorize employment-related pressures on career employees to induce their donations to the corporation's political fund; and

3) authorize the use of general assets to pay the operating costs of the corporate political fund without rebates to objecting stockholders.*

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* In addition to the International Association of Machinists and Aerospace Workers, the following parties appeared below as plaintiffs: William W. Winpisinger, Judy Reardon, Rebecca J. Ward, Anne S. Morrison, Alan B. Morrison, and Eugene Glover. In addition to the Federal Election Commission, Robert O. Tiernan appeared below as defendant in his capacity as Chairman of the Commission.

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JURISDICTIONAL STATEMENT

The International Association of Machinists and Aerospace Workers and six named individuals, appellants herein, appeal from the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on April 6, 1982, upholding the constitutionality of provisions of the FECA alleged to invade the First Amendment rights of corporate employees and stockholders and the First and Fifth Amendment rights of labor unions.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, which appears in the Appendix, p. 1a, *infra*, is not yet officially reported but has been published in 2 Fed. Elect. Camp. Fin. Guide (CCH) ¶ 9171. The order of the United States District Court for the District of Columbia certifying three separate constitutional questions for resolution by the Court of Appeals pursuant to 2 U.S.C. § 437h and entering findings of fact is unpublished and appears in the Appendix p. 64a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, finding no constitutional violations in the challenged FECA provisions, was entered on April 6, 1982. A notice of appeal to this Court was duly filed on April 21, 1982, and appears in the Appendix, p. 70a, *infra*. On June 29, 1982, Chief Justice Burger signed an order extending the time for docketing the case to and including August 19, 1982. The jurisdiction of this Court is invoked under 2 U.S.C. § 437h(b) which provides "any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fifth Amendments to the United States Constitution and the relevant provisions of the Federal Election Campaign Act, 2 U.S.C. §§ 437h and 441b, appear in the Appendix, p. 72a, *infra*.

STATEMENT OF THE CASE

Ever since the first protective legislation was adopted seventy-five years ago, federal law has barred corporations from spending institutional funds in federal election campaigns. In the view that a balance was required in the rules applicable to business and labor, first in 1943 and later in 1947 the ban on institutional spending for federal elections was extended to labor unions (that joint prohibition is codified at 2 U.S.C. § 441b(a)). In 1971, again maintaining parity between corporations and unions, the Federal Election Campaign Act (FECA) authorized an exception to the election spending ban. Both sides were permitted to solicit Political Action Committee (PAC) funds from their respective constituencies—the corporate stockholders and the union members. The Federal Election Commission's 1975 *SUNPAC* ruling, construing the statute to allow corporations also to solicit all their employees, led to 1976 amendments assertedly effective to restore the previous balance in the regulation of business and labor election spending rights. But in fact they have left the unions greatly disadvantaged vis-à-vis the corporations.

Nominally both sides are now precluded from spending their institutional funds in federal elections and authorized to spend only voluntary PAC contributions. But in actuality the ban on electoral spending with institutional funds now applies only to unions restricted to their members' voluntary contributions. For as construed and upheld below, the statute enables American corporations not only to use funds donated by their stockholders but also to raise funds from hundreds of thousands of vulnerable career employees, by pressuring their support to the institution which will determine their career opportunities and success. Due to the abstentionist position taken by the Commission concerning the use of employment-based

contribution pressures—to which the court below has given statutory and constitutional validation—corporations are now freed to use their institutional power over career employees to build political treasuries that can overwhelm the electoral process and the statutorily limited voice of labor. Thus the ruling below simultaneously sacrifices corporate employee liberty of political abstention and precludes the necessary even-handedness of the statute's election spending limitations upon corporations and unions.

1. *The Statutory History*

In 1907 Congress adopted the ban on corporate contributions in connection with federal elections out of concern that the massive financial power of corporations should not overwhelm our political system (Tillman Act, 34 Stat. 864 (1907)). Initially in 1943, and then permanently in 1947, Congress added labor organizations to the statutory ban under circumstances reviewed by this Court in *United States* v. *United Automobile Workers*, 352 U.S. 567, 570-84 (1957). Unions were added to the statutory ban in the view that parity is required in the election spending rules applicable to business and labor. As stated by Congressman Landis, author of the legislation that first extended the election spending ban to unions, the bill sought "to put labor unions on exactly the same basis, insofar as their financial activities are concerned, as corporations have been for years" (*id.* at 579).

Subsequent to the 1947 statute, although barred from using institutional funds, unions generally maintained their voice in federal elections by soliciting voluntary PAC donations from their members which they used for election contributions and expenditures. Validating that practice, an express exception to the ban on corporate and union election spending was adopted in 1971 authorizing

both unions and corporations to raise federal election PAC funds by solicitation of their respective constituencies—the union's members and the corporation's shareholders. Again the expressed intent of the Congressional sponsors was that "corporations and labor unions be treated absolutely equally" (117 Cong. Rec. 43382 (1971)).

As matters stood after 1971, corporations and unions remained singled out by a ban on the use of their institutional funds in federal elections, but an equivalently limited means was now available for both sides to obtain monies for federal election use: the nation's major corporations could solicit PAC funds from their 25 million stockholders while unions could solicit donations from their 21 million members. To assure that such PAC monies freed from the ban on federal election spending would be purely voluntary, the statute forbade a political action committee to make a contribution or expenditure of funds "secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal" (§ 205 of the Federal Election Campaign Act of 1971 [P.L. 92-225], 86 Stat. 10). In 1972 this Court went further in *Pipefitters' Local Union No. 562* v. *United States*, 407 U.S. 385, 413-14 (1972), construing the statute also to bar PAC solicitations "under circumstances inherently coercive" which might render a contribution less than a purely voluntary act even though not secured by threats of reprisal.

The parity of treatment which the federal law thus secured was abruptly broken in 1975 when the Federal Election Commission issued its *SUNPAC* opinion (A.O. 1975-23), permitting corporations to solicit employees who owe their livelihood to the company for payments to the employer's political fund. Though the Commission recognized that there is "a potential for coercion which is inherent in the employment relationship and which may be triggered by solicitation of employees by or

on behalf of an employer" (*id.* at 2), it concluded that the 1971 statute did not prohibit corporate solicitation of employees for PAC money.

The FEC's statutory reading was the subject of prompt congressional modification. It was immediately perceived that the balance of election spending limitations governing corporations and unions was threatened by the *SUNPAC* ruling, and that employees are psychologically vulnerable to employer solicitation—a perception reflected in the 1976 statutory amendments permitting corporate solicitation of hourly employees only through written solicitations under protected conditions of donor anonymity (2 U.S.C. § 441(b)(4)(B)). But as concerns career employees, the 1976 provision (2 U.S.C. § 441b(b)(2)) left all of the corporation's "executive or administrative personnel" within the reach of PAC solicitation without the arms-length protections that hourly employees were given. In the rush to enact the 1976 law to save the Commission from extinction in the wake of this Court's invalidation of the Commission's composition (*Buckley* v. *Valeo*, 424 U.S. 1 (1976)), there was little time for consideration of the potential imbalancing impact of this new departure.

The court below finds (*infra*, p. 30a), for instance, that Congress "apparently did not consider the difference in capacity between corporate and labor PACs when it formed the 1976 amendments." Indeed, whereas the House Committee version had provided only for corporate authority to solicit a handful of "executive officers," the broader Senate version prevailed with some confusion about the actual effect of what was enacted.[1] As noted by the ruling below (*infra*, pp. 20a-21a n.42), House leaders "believed mistakenly that the 1976 amendments simply restored the *status quo ante*." Thus, in great haste and

[1] As enacted, the 1976 provisions include not only employees with "policy making" or "supervisory" responsibilities but also those with "managerial" or "professional" responsibilities within the class of "executive or administrative personnel" (2 U.S.C. § 441b(b)(7)). The Conference Report explained that the broader definition is "in-

with no clear understanding, there was adopted a provision which has facilitated massive growth in corporate federal election spending financed with funds obtained by pressures on the employee that go far beyond the limited monies unions can obtain through their members' voluntary PAC donations.

2. *Corporate PAC Solicitation Methods Under the 1976 Amendments*

After the FEC dismissed, without investigation, appellants' administrative complaint concerning coercive PAC solicitation of corporate employees, appellants brought this action in the District Court and engaged in discovery concerning four of the nation's ten largest corporate PACs. That discovery demonstrates widespread use under the 1976 law of coercive techniques by which employment pressure is exerted on vulnerable career employees to maximize the number of contributors and the amounts of their contributions. A Dart Industries memorandum reveals the force of such pressure tactics (I. 103).[2] Conceding that few employees "if any, will voluntarily give money to a PAC unless they are compelled by a need," the memorandum explains that "we create a need for the individual to become a political activist through our PAC" which can induce employees to become contributors "not because of the purpose of the PAC, but because they feel a need to be part of the group." The record shows that each of the four corporations subjected to discovery below employs these pressure tactics in soliciting career employees.

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tended to include the individuals who run the corporation's business, such as officers, other executives, and plant, division, and section managers, as well as individuals following the recognized professions, such as lawyers and engineers, who have not chosen to separate themselves from management by choosing a bargaining representative" (H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. (1976), p. 62).

[2] "F" references are to the numbered findings of fact by the District Court. "I" references are to the numbered Items of the record certified by the District Court.

At Dart Industries, supervisor and peer pressure is used. Initially, employees receive notices that the corporation wants their money for political contributions to advance the company's business interests (F. 5-7). Then top Dart officials call the career employees into special small group solicitation meetings held at various company locations, usually during working hours (F. 28). While Dart refuses to disclose what it says to its employees at that time, the personal presentations doubtless underscore the repeated message of Dart's written solicitations: the company needs employee money to advance its business interests by political contributions. For some senior staff members who have not contributed even after the meetings, there is added the pressure of individual requests for payment from DARTPAC Treasurer Rhodes and from company Chairman Justin Dart (F. 36). The company has refused to disclose the numbers or identities of the employees whom Rhodes and Justin Dart have called upon for contributions, but it concedes the truth of Mr. Dart's statement to the Wall Street Journal that employees who don't give "get a sell" (I. 515(t)).

At Eaton Corporation, group sessions are used to induce career employees to contribute. When Eaton first set up its PAC in 1977, its top six hundred managers received letters stating that the company needed their PAC donations to advance its business interests through political contributions (F. 9-12, 14). Shortly thereafter, the same employees were called into unprecedented one and two hour group meetings by the senior officer at their work location to hear the message from the head of Eaton's PAC, and were admonished to "get into politics or get out of business" (F. 13, 29; I. 22, p. 2). As the company conceded in 1979: "Our face-to-face meetings with our managers were the most effective method of solicitation" for the corporate PAC (F. 30; I. 224). Like the earlier written solicitation, the presentation used at these group meetings underscores the company's business interest in receiving employee political donations (F. 13).

The message of these meetings was understood, for in its very first year of operation nearly 60% of those employees called to the meetings made contributions to the company PAC (F. 67).

United Technologies Corporation uses saturation solicitation and group meetings. The stream of written solicitations sent to United Technologies employees emphasizes that the company needs their donations in order to advance its business interests through election contributions (F. 15-20). Senior employees receive a letter signed by the Chairman and the President of UTC urging them to engage in political activity and endorsing the company's PAC (F. 45; I. 335). Soon employees receive a solicitation letter from the head of the PAC, which says that the company needs employee political donations to further its business interests (F. 17, 19). And after that the employee gets a letter from the President of his own subsidiary UTC corporation which adds a personal endorsement to the earlier donation requests (F. 18, 20, 46-50). Finally, and still within the few short weeks of these repeated solicitations, special meetings are convened at various company locations (lasting as long as 30 minutes, and often held at the workplace and during working hours), where employees get the personal message (F. 31). As the company conceded in 1979, these group meetings are a "most effective" method of solicitation for its PAC (F. 33; I. 391).

Winn-Dixie Stores, Inc., uses a special means of pressuring its employees. Winn-Dixie's written solicitations constantly emphasize that the employee's money is needed to further his employer's business interests (F. 23-27). Although Winn-Dixie does not call its employees into formal group meetings, it uses another solicitation device calculated to exert supervisory pressure. The manager of each division is told to prepare and sign a letter addressed individually to each of his senior employees asking him to make a contribution to the corporate PAC to further the company's business interests (F. 38). The division manager places this request in an envelope to-

gether with the employee's annual bonus check and then personally hands them to each employee he supervises (*id.*). Nowhere is the manager warned not to add a personal solicitation to the written request (*id.*, see F. 39), and when one such instance came to light through the work of an enterprising reporter it was grudgingly admitted by the corporation (F. 38). Finally, reports are sent to managers on which of their employees gave to the PAC and which did not (I. 526(r), 407, 419).

3. *The Explosive Growth of Corporate PACs Under the 1976 Amendments*

The vulnerability of career employees to the employment-pressured solicitations reflected in the present record is underscored by the dramatic growth in corporate Political Action Committees since Congress allowed career employee solicitations under the 1976 amendments. A 918% growth since 1975 in corporate Political Action Committees is reflected in Figure 1—a testimonial to the economic power which corporations can exert on career employees to build political funds while unions remain restricted to member donations.[3]

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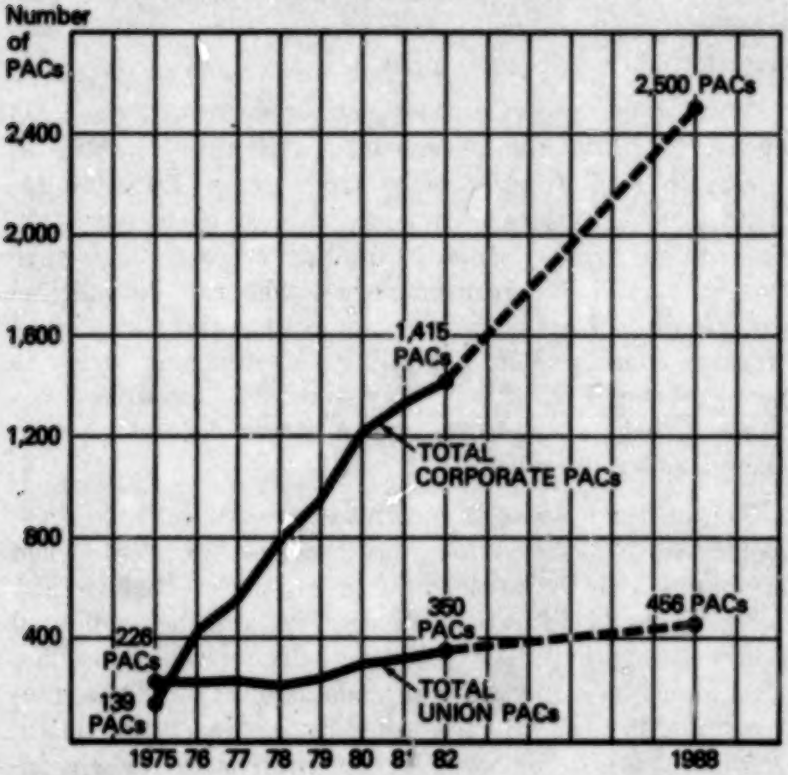
[3] Further underscoring the employment-derived origin of the growing corporate PAC treasuries are the unprecedented percentages of donating employees and the amounts of their donations. Thus, in Presidential election years, when interest is at its peak, only 9% of adult Americans contribute to any candidate (I. 1603, F.82); yet among all solicited career employees at Eaton the contribution rate has reached 50%, and among the other three corporations subject to discovery contribution rates range between 60% and 90% of upper echelon employees (F. 66, 69, 72, 77, 79). Moreover, the average 1980 employee contribution to the PAC sponsored by Dart Industries was $1,030 and among senior employees reached $1,435 (F. 74, 75); in contrast the average contribution to Presidential candidates in 1980 was $49.50 (F. 84). Considering that the monies are spent in the corporation's discretion for candidates from both parties, usually in races far removed geographically from the donating employee's voting residence, it is clear that the employment relationship is the gear that is driving the explosive growth in corporate PACs since corporations were freed by the 1976 law to solicit their career employees.

FIGURE 1.
GROWTH OF CORPORATE AND UNION POLITICAL ACTION COMMITTEES*



*1988 projections are extrapolated from 1975-1982 growth rates. 1982 figures are those released by the FEC in July 1982.

Yet the infusion into federal elections since 1976 of corporate PAC funds based on career employee solicitation has only begun. Many corporations have been slow to grasp the significance of the new means presented for corporate domination of federal elections which threatens to overwhelm the limited participation allowed by the law to organized labor. Although there are some 24,000 corporations in the nation each with assets of ten million

dollars or more, there are currently only 1,415 Political Action Committees sponsored by American corporations (FEC Press Release, July 12, 1982). Moreover, the majority of the *largest* corporations have not yet joined the bandwagon—two-thirds of Fortune's 1000 leading corporations do not yet have a PAC (I. 1604, 1605).

With so many corporations not yet exercising the PAC option, there remains an enormous untapped potential in corporate PAC funds derived from career employee solicitations. The several hundred largest corporations in the nation employ some 19 million workers and have nearly a million career employees who can be solicited for corporate PAC money; assuming that those employees were to contribute at prevailing contribution rates, the potential for PAC funds that could be pressured from those corporate employees for a single federal election exceeds 503 million dollars.[4]

The political power of such massive sums solicited from employees by their employers becomes apparent when compared with the present far more modest (but rapidly increasing) PAC funds of corporations and their affiliated trade associations. In the 1980 election $63.9 million were spent by corporate and trade association PACs, representing 49% of *all* PAC spending in the election (Item 1302). Those funds were largely contributed to win in-

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[4] The total employment force of those largest American corporations is 18.9 million workers (Bureau of Census, "General Report on Industrial Organization" (1981) p. 146). Among the four corporations subject to discovery below, 4.8% to 8.4% of their total employment forces fall within the "executive or administrative employee" exception (F. 148). Applying a conservative 5% estimate to the largest American corporations reveals that they can solicit some 945,000 employees without limitation. And those corporations would have available some $508 million if each of those employees contributed $553 (the average amount obtained in 1980 by Dart, United Technologies and Winn-Dixie from contributing employees, F 74, 76, 78).

fluence in the Congress for business interests—the PACs of corporations and business-related trade associations contributed most heavily to committee chairmen or ranking minority members, many of whom did not even have significant election opposition. For example, these PACs gave Senate Finance Committee Chairman Russell Long $409,000 of his $518,000 in PAC monies, and gave Robert Dole, the Committee's ranking minority member, $255,000 or over three-fourths of the total PAC funds he received (Common Cause, *Money, Power and Politics in the 97th Congress* (1981), pp. 74-81). The corporations and business-related groups gave $170,000—some 78% of his PAC donations—to Strom Thurmond, now Chairman of the Senate Judiciary Committee who received 78% of the popular vote in his reelection (*id.* at 92-97). Jake Garn, now Chairman of the Senate Banking Committee, received $192,000 from business PACs (representing 80% of his PAC contributions), and won with 74% of the popular vote (*id.* at 44-50). Jamie Whitten, Chairman of the House Appropriations Committee, got 74% of his PAC money from business PACs and won with 63% of the popular vote (*id.* at 159-63). Congressman Rostenkowski, Chairman of the Ways and Means Committee and also the Joint Committee on Taxation, won 84% of the re-election ballots but still received $106,000 from business PACs (*id.* at 224-29).[5]

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[5] Entire committees are flooded with business PAC money because of their influence on economic legislation although their members face little election opposition. In 1980, of 30 members of the House Ways and Means Committee who collectively received $1.7 million dollars from business-related PACs, 15 won reelection with majorities ranging from 66% to 97% of the popular vote (see Public Citizens' Congress Watch, "Supply Side Economics: Campaign Contributions to the House Ways and Means Committee, 1979-80"). Seeking to maintain its statutory price supports, the dairy industry contributed $3.1 million to Congressional campaigns between 1977 and 1980, primarily to members of the Agriculture committees; during their 1979-80 campaigns members of the House Agriculture Committee received $213,000 from three of the largest dairy industry trade associations (see *Washington Post*, March 6, 1981, p. C16).

4. *The Ruling Below*

By its approval of unprecedented employee solicitation methods that have inherently coercive force, the ruling below simultaneously sacrifices employee liberty of political abstention and aggravates the statutory imbalance in the PAC capacity of corporations and unions. Under the 1976 amendments corporations and labor organizations nominally remain singled out for a ban on federal election use of their institutional funds. But while unions are only permitted to use PAC funds voluntarily contributed by their constituent members, corporations are freed to solicit not only their constituent stockholders but also to reach deep into the ranks of their career employees. Ignoring the extensive documentation and findings in the record that major corporations use institutional power to exploit the vulnerable position of such career employees through inherently coercive methods of PAC solicitation, the court below embraces the FEC's *laissez faire* reading of the statute and upholds the law as thus construed. Thereby it allows corporate employees to be saddled with the burden of their employer's political needs when they are subjected to employment-related pressures for PAC payments. The vulnerable career employee is constrained to feed the hand that feeds him by such compulsive methods as small group solicitation meetings, admonitions that employee loyalty requires contributions to the fund, saturation solicitations from highest level officers, demands by superiors to answer to them for failure to contribute, and such blatant appeals for employee kickbacks as personal solicitation letters from the supervisor delivered to each employee with his annual bonus.

The ruling below, however, never pauses to consider the stipulated evidence documenting such inherently coercive methods of solicitation. Yet donations that result from such solicitation methods clearly reflect the fact of the employment relationship and the unique power of corporations under the statute to build political funds upon that relationship. In approving the use of solicitation

methods that exploit the employment relationship to undermine employee freedom of choice, the ruling below sacrifices vital political liberties. At the same time it aggravates the statute's imbalanced regulation of corporate and union electoral activity, when unions remain confined to membership donations while corporations can solicit not only their stockholders but also invoke the power of the employment relationship to pressure career employee payments to the political fund.

SUBSTANTIAL FIRST AND FIFTH AMENDMENT ISSUES ARE HERE PRESENTED FOR REVIEW

1. *The inequality which the court below upholds in the federal election participation rights of corporations and unions, presents serious First and Fifth Amendment issues.* In rejecting the union's claim of unequal statutory regulation, the court below errs in its refusal to apply the "compelling interest" standard to a statute that severely restricts union participation in federal elections while it allows corporations a far more potent escape from the ban on their institutional participation. Distinguishing *Buckley* as a case involving "limitations on campaign contributions and expenditures," the court below (*infra*, p. 27a) bases its rejection of the strict standard of equal protection on the view that the statute does not "place limits on any individual's speech or participation in the electoral process." But it is, precisely, limits on speech and participation in the electoral process that are here at issue, for the statute bars union contributions and expenditures in federal elections except by means of PAC funds that unions solicit from their members. Thus the court below is quite mistaken in measuring the union's claim of unequal statutory regulation under a standard less rigorous than the compelling interest test, *since there is here a plain and severe statutory limitation on the exercise by unions of their First Amendment right to participate in federal elections.*[6]

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[6] So severe is the limitation that in *UAW* three Justices eschewed constructional avoidance of constitutional doubts and would have

In focusing only on what Congress has *allowed* unions in the area of federal election spending, the court below misses the point that their PAC privilege is but an exception to the statute's general prohibition on union political spending in federal elections—a regulation of union First Amendment rights that clearly invokes the most exacting standard of equal protection. As this Court recently emphasized, "regulation of First Amendment rights is always subject to exacting judicial review" (*Citizens Against Rent Control* v. *Berkeley*, 102 S.Ct. 434, 436 (1982)). Moreover, in the First Amendment area equality of statutory regulation is particularly the constitutional rule (*Metromedia, Inc.* v. *San Diego*, 101 S.Ct. 2882 (1981); *Police Department* v. *Mosley*, 408 U.S. 92 (1972); *Hague* v. *CIO*, 307 U.S. 496 (1939)). The court below thus clearly errs in refusing to apply the compelling interest standard to the union's claim of unequal limitation on union and corporate political spending. As this Court reemphasized in *Buckley*, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office" (424 U.S. at 15). Moreover, the present case involves, as did *Buckley*, not only statutory inhibition on union election contributions but also on union election *expenditures*, to which the compelling interest standard of review should clearly have been applied by the court below. *Citizens Against Rent Control*, 102 S.Ct. at 439.

The lower court's mischaracterization of the statute as if it were merely permissive rather than restrictive of political spending, equally infects its disposition on the merits of the equal protection issue. On that score the court concedes (*infra*, p. 30a) that Congress apparently "did not consider the difference in capacity between corporate and labor PACs," when in the 1976 amendments "it allowed corporations to solicit not only stockholders

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invalidated the limitation as "a broadside assault on the freedom of political expression guaranteed by the First Amendment" (352 U.S. at 598).

but also their employees." The court (*infra*, p. 34a) nevertheless proceeds to justify that difference on the ground that Congress is not required to "equalize the voices of corporate and labor PACs." The court below would be correct in that view if Congress had not forbidden unions and corporations to spend their institutional funds in federal elections. But what the court below overlooks here—as much as in its erroneous rejection of the compelling interest standard—is that Congress has entered the field in a highly restrictive fashion by confining unions and corporations in their participation in federal elections. Once unions are thus statutorily *restricted* out of congressional concern for parity between business and labor, the *escape* that Congress provides on either side must also be even-handed. Having added the ban on union election spending under the 1943 and 1947 provisions to the corporate ban in order to achieve parity between business and labor, equal protection requires Congress also to maintain parity for unions in any PAC exceptions it allows to that ban.[7]

In sum, contrary to the lower court's rejection of the equal treatment duty, equality of political spending regulation is the governing constitutional rule here that invalidates unequal limitations on corporate and union election participation. Given the far greater size and power of the business community than that of the union sector, there could be no constitutional justification for imposing more relaxed federal election spending limits on corporations than on unions. No possible compelling interest exists for

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[7] Indeed, the ruling below recognizes (*infra*, p. 17a) that prior to the 1976 amendments the law itself reflected the goal of "equitable balance" and that in 1976 Congress itself recognized the need "to insure even-handed treatment of corporations and labor unions" (*infra*, p. 17a). In that respect the court below (*infra*, p. 21a) quotes Representative Brademas in his emphasis that the 1976 House bill "represents an equitable balance between the rights of corporations and labor unions," but it concedes (*infra*, pp. 20a-21a n.42) that Representative Brademas "believed mistakenly that the 1976 amendments simply restored the *status quo ante*."

the imbalance created in 1976 by provisions confining union federal election participation to funds contributed by member-constituents, while allowing corporations to go beyond their stockholders to solicit deep within the ranks of their numerous and vulnerable career employees.[8]

2. *Sacrificing career employee liberty to abstain from political action, the ruling below endorses the use of employment-related pressures by corporations to obtain employee political payments.* By the lower court's failure to interdict corporate pressure on career employees to donate to the political fund, it sacrifices employee political liberties and renders the more unequal the statutory provisions that confine union election spending to member donations while authorizing corporations to spend both stockholder and employee donations. In that respect the constricted focus of the ruling below only upon the high rates and amounts of career employee donations (*infra*, 37a-39a) obscures the point of the *tainted solicitation methods* used by the corporations in order to induce employees to give "not because of the purpose of the PAC, but because they feel a need to be part of the group" (*supra*, p. 7).

A reasonable statutory interpretation applying this Court's *Pipefitters'* gloss could have avoided the serious First Amendment issue which arises from the lower court's *laissez faire* statutory reading. As the corporations openly concede (F. 25), it is *because* Congress has barred corporations from using their funds in federal

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[8] We need not pause long over the lower court's alternative justification (*infra*, p. 31a) that career employees "will identify with the corporate direction, purpose, and welfare" more than will shareholders and so it was reasonable for Congress to include a right of recourse by the corporation to its career employees for payments to the political fund. However "reasonable" it might be to authorize corporations to solicit their employees, the vulnerability of such employees to entreaties of the employer only underscores the inequality thereby thrust upon unions which are permitted to spend only voluntary donations from their member-constituents.

elections but allowed them to use employee money that their employees are being subjected to employer political solicitations. When Congress has barred corporation federal election expenditures but allowed them an escape hatch through employee solicitation, federal responsibility clearly attaches to the conditions under which the statute makes employees vulnerable to such employer solicitation. Since it is the statute's bar and its exception which together induce corporations to solicit employees for political tribute, the First Amendment clearly applies to the solicitation methods the statute authorizes.

Yet the court below offers no cogent explanation of how the coercive employer pressures here demonstrated could be deemed consistent with long-accepted liberty of abstention from political activity. See *Wooley* v. *Maynard*, 430 U.S. 705 (1977); *Elrod* v. *Burns*, 427 U.S. 347 (1976); cf. *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 566 (1973).[9] In seeking somehow to rationalize the practices it deems the statute to authorize, by which corporations squeeze political contributions from employees, the ruling below (*infra*, p. 47a) asserts that government does not "require corporations to set up a PAC and solicit their employees." But this is fiction, for the statute's prohibition on corporate

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[9] In *Letter Carriers*, in upholding a statutory ban on federal employee political activity, the Court noted the danger of psychological pressures by management on an employee asked to give political support (*id.* at 566): "A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than act out their own beliefs." And in terms directly applicable to the present issue the Solicitor General's *Letter Carriers* brief (p. 10) emphasized the danger that "in many instances, the employee might feel that his prospects for job advancement would be enhanced by political activity aligned with his superior's partisan political predilections."

election spending—excepting only spending of PAC donations—*plainly does require* a corporation to solicit its employees if it wants to participate in a federal election —a fact underscored by the explosive growth since the 1976 statutory amendments in corporate PACs built on career employee payments (see *supra*, pp. 10-11). The lower court's constitutional rationalization of the employment-related donation pressures placed on employees thus suffers from the same fatal flaw which infects its disposition of the union inequality claim, for it similarly fails to recognize the force of the underlying spending prohibition to which the PAC fund option is the sole statutory exception.

3. *A third substantial issue arises: whether Congress can validly authorize the use of objecting stockholders' assets to fund the costs of their corporation's PAC operations.* The ruling below construes the statute to permit, without First Amendment impediment, the use by corporations of objecting stockholders' assets to pay the operating costs of the PAC (*infra*, p. 53a). A reasonable construction of the statute avoiding the constitutional issue that thus arises would preserve a balance between the statute's ban on corporate and union election spending, by according a dissenting stockholder the same right to abstain as that extended to a union member who does not wish to support union political expenses. See *Machinists* v. *Street*, 367 U.S. 740 (1961). Such a statutory construction is the more appropriate considering that the Commission itself recognizes the Congressional desire to protect the First Amendment right of stockholders to refrain from supporting political candidates. As stated in the Commission's pending brief to this Court in *FEC* v. *National Right to Work Committee*, No. 81-1506 (pp. 18-19):

> "The second purpose behind § 441b is to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support

political candidates to whom they may be opposed. *United States* v. *CIO*, 335 U.S. 106, 113 (1948). This emphasis on ensuring that individuals have the opportunity to make a knowing and voluntary choice before their money is used to support political candidates safeguards the individual's first amendment interest in not being required to contribute to the support of any political candidate against his or her will. It also furthers the important governmental interest in 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government,' by ensuring that each individual makes a personal decision about the political options he or she will support."

Contrary to these well-stated constitutional considerations, the ruling below adopts a construction which invades the First Amendment rights of objecting stockholders by applying their corporate assets to the costs of the political fund's operations. For that result the ruling below purports to find support in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); but as properly noted in the concurring opinion of Judge Edwards (*infra*, p. 56a n.2), in that case "the proposed remedy for the infringement of the right of political abstention was the total silencing of the majority. . . ." Here, on the other hand, what is at stake is not the majority's power to spend funds for politics but only the question whether in order to preserve their established First Amendment liberty of abstention, dissenters are entitled to rebates on account of such expenditures authorized by the statute. Cf. *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977); *Machinists* v. *Street*, *supra*.

Moreover, the rationalization by the court below (*infra*, p. 50a) that the objecting stockholder can take his assets elsewhere is not only legally but also practically fallacious. With so many of the nation's corporations already aboard the PAC bandwagon and with most soon likely to be aboard given the present growth rate (see *supra*, p. 11), the supposed stockholder option to transfer hold-

ings to other corporations that do not spend general assets for PAC costs is not a viable one. Indeed, in the case of stockholder-plaintiff Glover, who acts as a trustee for the placement of IAM employee pension funds, there is even a legal question whether the prudent investment rule of ERISA would permit him freely to shift such funds to other corporations. There is insult added to injury when union member pension funds must be placed with corporations that use objecting stockholders' assets to support a PAC which finances anti-labor candidates in federal elections. Such are the questionable consequences of the lower court's ruling that under the statute objecting stockholders have no recourse against use of their assets to pay the costs of the company political fund.

* * * *

The net result of the three constitutional wrongs of which the plaintiffs complain in this case is a serious asymmetry in the statutory scheme of regulation affecting corporations, unions and non-stock corporations. The asymmetry arises when the statute, as construed and upheld by the court below, confines unions and other organizations to the genuinely voluntary political donations of their constituent-members while corporations are freed to use objecting stockholders' assets for politics and to induce their employees to pay to the political fund by exerting the pressures of the employment relationship. A similar asymmetry arising from a construction of the statute that permits political solicitation beyond an organization's constituent group of members is before this Court on grant of certiorari in No. 81-1506, *National Right to Work Committee* v. *FEC*. The decision there under review permits a non-stock corporation and its PAC to solicit funds from persons with only the most tenuous relationship to the organization, creating thereby significant imbalance in the FECA "constituent" scheme permitting stock corporations to solicit their stockholders and non-stock corporations and unions to solicit their members.

The statute's symmetry is no less threatened here, where the question is not only *who* may be solicited but what *methods* of solicitation may be employed. To permit corporate solicitation of career employees under inherently coercive circumstances while unions are confined to members' voluntary donations is certainly as much a distortion of the symmetrical statutory scheme as it is to permit solicitation of non-members by the Right to Work Committee. As the FEC itself urges in its pending brief in *National Right to Work Committee*, the unifying factor underlying the statute's symmetry is that corporations, unions and unincorporated associations can only solicit their "*constituents*"; section 441b of the Act, says the Commission, is "a constitutional exercise of the power of Congress to regulate the federal election process, which is narrowly drawn to protect the federal election from corruption, while at the same time permitting corporate and union sponsorship of group political activity by their constituents" (p. 13; see also pp. 12, 27, 28). And the FEC's brief goes on to state that corporations and unions are authorized to finance their PACs "only because they are intended to function as a surrogate for the direct political contributions by the organization itself which the statute prohibits. Thus, the statute properly limits separate segregated funds to soliciting contributions only within the sponsoring organization, from those classes of individuals whose interest the corporate or union has a *fiduciary obligation* to represent" (p. 31, emphasis added).

Thus, whether viewed as a matter of statutory construction or of constitutional validity, the necessary hallmark of the Congressional scheme is voluntary political action by *constituents* for whom the corporation or union is the *fiduciary*. We would submit that it is wholly inconsistent with the concepts of constituency and fiduciary obligation for the statute to subject corporate employees to employment-pressured political solicitation, and to subject objecting stockholders to compulsory support of PAC fund costs. And, as we have shown, the departures from

the traditional respect for liberty of political abstention which the lower court here approved renders the more unequal and imbalanced the statute's regulation of corporate and union spending in federal elections.

CONCLUSION

Serious First and Fifth Amendment issues are here presented concerning the operation and even-handedness of important federal election law provisions. As this Court's *Buckley* decision made clear, inadequate consideration has been paid in FECA to fundamental constitutional principles even though Congress may have acted from worthy motives. Here there are presented seminal FECA questions concerning employee and stockholder freedom from coercive political exactions, and concerning the statute's unequal inhibition on union and corporate spending in federal elections. The questions are of substantial constitutional significance and require this Court's plenary review.

Respectfully submitted,

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August 19, 1982

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1664

INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, *et al.*,
Plaintiffs

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants

On Certification of Constitutional Questions from the United States District Court for the District of Columbia

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Argued En Banc October 14, 1981

Decided April 6, 1982

John Silard, with whom *Joseph L. Rauh, Jr.*, *James C. Turner*, and *Judy Lyons Wolf* were on the brief, for plaintiffs.

Carolyn U. Oliphant, Special Assistant General Counsel, Federal Election Commission, with whom *Charles N. Steele*, General Counsel, *Richard B. Bader*, Assistant General Counsel, and *Jeffrey H. Bowman*, Attorney, Federal Election Commission, were on the brief, for defendants. *Kathleen Imig Perkins*, Attorney, Federal Election Commission, also entered an appearance for defendants.

Before ROBINSON, *Chief Judge*, TAMM, ROBB, WILKEY, WALD, MIKVA, EDWARDS and GINSBURG, *Circuit Judges*.

Opinion PER CURIAM.

Opinion concurring in part and concurring in the result filed by *Circuit Judge* EDWARDS.

Concurring opinion filed by *Circuit Judge* EDWARDS.

OUTLINE OF OPINION

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I. INTRODUCTION

Before this *en banc* court are three questions concerning the constitutionality of two provisions of the Federal Election Campaign Act ("FECA" or the "Act") [1] that regulate the solicitation practices of corporations and labor unions. Plaintiffs—a national labor organization and six individuals [2]—argue that Congress has acted without sufficient regard for their political speech rights and the political speech rights of others in face of the proliferation of corporate political action committees ("PACs") and their concomitant increased influence in federal elections. Specifically, plaintiffs allege that (1) Congress in the 1976 FECA amendments has created an unconstitutional imbalance between corporations and labor unions, in favor of the former, by allowing corporate PACs to solicit their executive and administrative (career) employees; (2) such corporate solicitation of executive and administrative employees, which occurs under inherently coercive circumstances, violates the First Amendment right of career employees to abstain from political expression; and (3) the provision of the Act that authorizes the financing of operating and administrative costs of a corporate PAC from general corporate assets violates the First Amendment rights of dissenting shareholders.

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[1] Sections 321(a), (b)(2) of the Act, 2 U.S.C. §§ 441b(a), 441b(b)(2). All citations will be to the current code unless otherwise specified.

[2] Plaintiffs are the International Association of Machinists and Aerospace Workers ("IAMA" or "Union"); William Winpisinger, President of IAMA and an individual eligible to vote in federal elections; Eugene Glover, an officer of IAMA and trustee of the Union's pensi[illegible] plan; Alan and Anne Morrison, joint shareholders of common stock of the Eaton Corporation (one of the eleven corporations targeted in plaintiffs' administrative complaint, *see* note 4 *infra*) and eligible voters in federal elections; Judy Reardon and Rebecca Ward, individuals eligible to vote in federal elections.

On June 3, 1981, the district court certified three questions matching these allegations pursuant to section 315(a) of the Act, 2 U.S.C. § 437h(a), the extraordinary judicial review provision of the Act, which provides: "[t]he district court immediately shall certify all questions of constitutionality of this Act to the United States Court of Appeals for the circuit involved, which shall hear the matter sitting en banc." [3] Finding none of plaintiffs' argument legally persuasive, we rule against them on each of the certified questions, and hold that the congressional product before us does not transgress constitutional limitations.

II. History of the Case

On October 9, 1979, plaintiffs filed an administrative complaint with the Federal Election Commission ("FEC" or "Commission"), pursuant to 2 U.S.C. § 437g(a)(1), alleging that the solicitation practices of eleven selected corporations,[4] in obtaining funds for their political action committees, contravened the prohibitions in section

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[3] Because this controversy is brought here on certified questions, no dispositive order of the district court is before us for review. It appears that at least as to the certified questions, Congress vested the court of appeals with *original* jurisdiction. *See* 2 U.S.C. § 437h(a) ("the district court immediately shall certify all questions of constitutionality"); *id.* § 437h(b) ("[A]ny decision on a matter certified . . . shall be reviewable by appeal directly to the Supreme Court . . . ."). Therefore IAMA and the six individuals retain their status as plaintiffs and the Federal Election Commission, its status as defendant.

[4] The corporations named in plaintiffs' complaint are: the International Paper Company, Standard Oil of Indiana (AMOCO), Dart Industries, Inc., Winn-Dixie Stores, Inc., the General Electric Company, Union Camp Corporation, General Motors Corporation, United Technologies Corporation, Eaton Corporation, Union Oil of California, and Grumman Corporation. All are corporations whose stock is publicly traded.

441(b).[3] Alternatively, plaintiffs argued that if the Commission construed the relevant provisions of the Act to permit the corporate conduct challenged in the com-

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[3] Section 441b(a) states the general principle that it is unlawful for any corporation or labor union to make a campaign contribution or expenditure except as permitted elsewhere in § 441b. In § 441b(b)(2), "contribution or expenditure" is defined to *exclude*

> (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) non-partisan registration and get-out-the vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

Section 441b(b)(7) defines "executive or administrative personnel" (also referred to herein as "career employees") as "individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities."

Separate segregated funds are commonly called political action committees ("PACs"). Section 441b(b)(3) limits the solicitation practices of PACs, providing that

> It shall be unlawful—
>
> (A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;
>
> (B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and
>
> (C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the

plaint, then those provisions of FECA violate the First and Fifth Amendment rights of the plaintiffs. Acting on a recommendation from the Commission's General Counsel that there was no "reason to believe" the Act had been violated, the Commission, on December 13, 1979, unanimously voted to dismiss the complaint without further investigation and without an additional statement of reasons.

On February 4, 1980, plaintiffs filed a four-count complaint for injunctive and declaratory relief in the district court, pursuant to section 437g(a)(9)(A),[8] seeking

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time of such solicitation, of his right to refuse to so contribute without any reprisal.

Restated, a contribution to a PAC must be wholly voluntary. Such a contribution cannot be obtained by force or threat, it must be consensual, it may be made only after the purpose of the PAC has been disclosed and even then, only if the potential contributor knows he has the right to refuse to give to the fund with no risk of reprisal. Corporate PACs are permitted to solicit the corporation's stockholders and their families and the corporation's executive or administrative personnel and their families, and labor union PACs, the union's members and their families, subject only to the prohibitions of § 441b(b)(3).

Under § 441b(b)(4)(B), corporate solicitation of hourly employees (neither shareholders nor executive or administrative employees) and labor solicitation of non-member shareholders and employees must be confined to two written solicitations, addressed and mailed to the employees or shareholders at their residence, and designed so that the corporation or labor union, or their PAC, cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution. All other solicitation is prohibited under § 441b(a). The limited written solicitation permitted in § 441b(b)(4)(B) is not at issue in this case. "Solicitation," as the term is used in this opinion, refers to the oral and written solicitations permitted, prohibited, or restricted by §§ 441(b)(a), 441b(b)(2)-(4).

[8] Section 437g(a)(8) provides in pertinent part: "Any party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition with the United States District Court for the District of Columbia."

review of the Commission's dismissal of their complaint. The first count alleged that "corporate PAC solicitations of unprotected career employees are yielding donations which are not free and voluntary, and constitute corporate political contributions because they result from the employment relationship." Plaintiffs maintained that because these solicitations violated the Act, the Commission failed to discharge its statutory duty to investigate; thus, the Commission's dismissal was contrary to law.

The second, third and fourth counts all alleged constitutional violations. Plaintiffs made clear in their complaint that they sought relief on their constitutional claims only if they were denied relief on the statutory count. Plaintiffs sought certification of the constitutional issues to this court pursuant to section 437h(a).

On cross-motions for summary judgment on the statutory claim, the district court upheld the Commission's dismissal of plaintiffs' administrative complaint. The Commission had previously filed a motion to dismiss the constitutional counts for failure to state a claim upon which relief can be granted and for the further reason that plaintiffs lacked standing to sue. The district court denied the motion to dismiss and announced it would certify the three constitutional questions for this court's *en banc* determination. The court found plaintiffs' constitutional claims "neither frivolous nor so insubstantial as to warrant dismissal for failure to state a claim."[7] As to standing, the court concluded that each of the plaintiffs had made a threshold showing of injury in fact sufficient to satisfy Article III.[8] The court further ruled that, although no corporate executive or administrative employee was party to the litigation, the plaintiffs pos-

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[7] Memorandum Opinion, International Ass'n of Machinists and Aerospace Workers v. FEC, Civil Action No. 80-354, at 10 (D.D.C. December 16, 1980) [Mem. Op.], App. 19.

[8] Mem. Op., *supra* note 7, at 10, App. 19.

sessed standing to assert vicariously the First Amendment rights of such employees.[9] On January 12, 1981, plaintiffs noticed their appeal from the district court's order upholding the Commission's dismissal, D.C. Cir. Docket No. 81-1044.

Section 437h(a) requires a district court to certify immediately all questions of the constitutionality of the Act. However, as this court recognized in *Buckley v. Valeo*, 519 F.2d 817 (D.C. Cir. 1976) (*en banc*), it is undesirable to decide a constitutional issue abstracted from its factual context.[10] Therefore, on January 8, 1981, the district court entered a consent order providing for discovery of facts concerning the solicitation practices of four of the eleven corporations named in plaintiffs' administrative complaint. On April 27, 1981, the parties signed an agreement stipulating two hundred ten findings of fact. The district court, on June 3, 1981, certified the three constitutional questions[11] and sub-

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[9] *Id.*

[10] The Supreme Court stated recently that "as a practical matter, immediate adjudication of constitutional claims through a § 437h proceeding would be improper in cases where the resolution of such questions required a fully developed factual record." California Medical Ass'n v. FEC, 101 S.Ct. 2712, 2720 n.14 (1981).

[11] The three certified questions are:

1. Do the provisions of the FECA (2 U.S.C. § 441b(a) and § 441b(b)(2)) which ban corporate contributions to federal elections but which authorize corporate solicitation of executive and administrative employees for donations to a "separate segregated fund" which the corporation may use to contribute to federal elections, violate the rights of such employees under the First Amendment to the Constitution of the United States?

2. Do the provisions of FECA (2 U.S.C. § 441b(a) and § 441b(b)(2)) which bar corporate and union contributions in connection with federal elections but allow a corporation to make contributions through its separate segregated fund with money solicited from its stockholders and its executive and administrative personnel, and a labor union to make contributions through its separate segregated fund with money solicited from its mem-

mitted as the record the findings of fact agreed to by the parties. This court gave the certified constitutional case a regular docket number, No. 81-1664.

The Commission renewed in this court its motion to dismiss for lack of standing. This court sitting *en banc* consolidated the statutory appeal in No. 81-1044 with the certification of constitutional questions in No. 81-1664, deferred decision on the motion to dismiss until after argument, and expedited the two cases as contemplated by the Act.[12]

On October 26, 1981, this court issued a judgment in No. 81-1044 affirming the district court's disposition of the statutory claim, thereby putting squarely in issue plaintiffs' three constitutional challenges.

III. STANDING

The Commission contends initially that none of the plaintiffs possesses the "voter standing" section 437h(a) requires; accordingly, the plaintiffs are not eligible to invoke the expedited procedure. Second, the Commission argues that the plaintiffs have failed to meet the Article

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bers, create an unconstitutional imbalance between corporations and labor unions in violation of the rights of labor unions and their members as protected by the First and Fifth Amendments?

3. Do the provisions of FECA (2 U.S.C. § 441b(a) and § 441b(b)(2)) that authorize the use of general corporate assets to pay the operating costs of a corporation's separate segregated fund that makes contributions to federal candidates violate the First Amendment rights of a stockholder who objects to the use of his corporate assets for political purposes?

[12] *See* 2 U.S.C. § 437g(a)(10) ("Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under [§ 437h]")); *id.* § 437h(c) ("It shall be the duty of the court of appeals . . . to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under [§ 437h(a)].").

III "case or controversy" requirement. We reject both arguments and therefore deny the Commission's motion to dismiss at the threshold.

The text of section 437h states that these categories of plaintiffs may invoke the certification procedure: "[t]he Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President." 2 U.S.C. § 437h(a). In *Bread Political Action Committee v. FEC*, 50 U.S.L.W. 4291 (U.S. March 8, 1982), the Supreme Court held that only parties who fit one of these three descriptions have recourse to the expedited, certification procedure. Accordingly, IAMA lacks the requisite statutory standing and must be dismissed as party plaintiff. The Commission maintains further that the "voter standing" Congress granted in section 437h(a) is confined to plaintiffs who put in issue their First Amendment rights *qua* voters. The individual plaintiffs, under the Commission's analysis, lack standing to utilize section 437h; although each is an eligible voter, no individual plaintiff has raised an issue as to his or her right to vote. Rather, plaintiffs raise issues as union members, as corporate shareholders, and on behalf of corporate employees, not as voters.

Only one decision has embraced this pinched construction of section 437h(a). In *Martin Tractor Co. v. FEC*, 460 F.Supp. 1017, 1019 (D.D.C. 1978), *aff'd on other grounds*, 627 F.2d 375 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980), the court stated:

> [T]he individual plaintiffs do not sue in their individual capacities to protect their individual rights to vote or even to make contributions. They sue to vindicate a claimed right of their corporate employer to influence its employees . . . to make voluntary political contributions. While the question is not free from doubt, the Court has concluded that this kind of derivative right was not the constitutional right of "an individual eligible to vote" which Con-

> gress considered "appropriate" for vindication in a special declaratory judgment action under § 437h, particularly where, under the statutory scheme there is an alternative process for resolution of the substantive issue in the context of a particular transaction....

In the case before us, plaintiffs *did* proceed under the "alternative process for resolution" of their challenges; they pursued a section 437g enforcement action. The district court removed the constitutional issues from the section 437g action and certified them to this court pursuant to section 437h. This is the proper mode of procedure for questions of the Act's constitutionality arising in section 437g proceedings. *California Medical Ass'n v. FEC*, 101 S.Ct. 2712, 2717-19 (1981).

Martin Tractor apart, we find no support for the Commission's position that section 437h(a) qualifies voters to raise constitutional issues only in relation to their rights as voters. Neither the language of the statute (*any* eligible voter, *all* constitutional questions) nor its legislative history suggests an interpretation so constricted. We note further that the Commission's view is difficult to reconcile with *California Medical Ass'n v. FEC*, 101 S.Ct. 2712 (1981), in which the Supreme Court adjudicated a section 437h challenge to a provision of the Act regulating trade association activity. In short, we reject the FEC's severely limited voter standing delineation, disapprove *Martin Tractor* to the extent it adopted the Commission's view, and hold that the plaintiffs who are "individuals eligible to vote" in federal elections have statutory standing to invoke the section 437h certification procedure. *See California Medical Ass'n v. FEC*, 101 S.Ct. at 2717 n.6 (1981); *Buckley v. Valeo*, 424 U.S. 1, 12 (1976).

We are also satisfied that the individual plaintiffs have Article III standing to raise the constitutional claims. The union member plaintiffs allege that they suffer a

relative diminution in their political voices—their influence in federal elections—as a direct result of the discriminatory imbalance Congress is alleged to have ordered in the 1976 FECA amendments; they further assert that a ruling declaring the amendments unconstitutionally discriminatory would likely redress their injury. Similarly, the stockholder plaintiffs allege that the use of "their" corporate assets to establish and support a PAC impinges upon their political freedoms; a ruling invalidating the authorizing statute would eliminate this asserted harm. These arguments are sufficient to establish the individual plaintiffs' standing under Article III to assert *their* First and Fifth Amendment rights. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). However, no executive or administrative employees appear among the named plaintiffs.[13] Those plaintiffs seek to assert vicariously alleged First Amendment rights of career employees to abstain from political expression.

The Supreme Court has repeatedly cited the prudential limitation on standing that a plaintiff generally may assert only his own legal interests, and may not raise those of third parties. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979); *Warth v. Seldin*, 422 U.S. at 499 (1975). This prudential rule against the assertion of third-party claims is designed "to limit access to the federal courts to those litigants best suited to assert a particular claim," *Gladstone, Realtors*, 441 U.S. at 100. Because the rule is not of constitutional dimension, the Court has recognized exceptions to it in a number of cases. *See*,

[13] Alan Morrison, as Director of Litigation for Public Citizen, Inc., is the only plaintiff employed as an executive or administrative employee. However, Public Citizen is a nonprofit corporation plaintiffs did not cite in their administrative complaint, and Alan Morrison does not allege that he has ever been solicited to contribute to a PAC while an executive or administrative employee of any corporation. Findings of Fact 196-198.

e.g., Carey v. Population Services, Int'l, 431 U.S. 678 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Barrows v. Jackson*, 346 U.S. 249 (1953). Moreover, it is clear that Congress may, by legislation, permit one who satisfies Article III requisites in his own right to assert vicariously the rights of third parties. *Gladstone, Realtors*, 441 U.S. at 100 (1979); *Warth v. Seldin*, 422 U.S. at 501 (1976). We believe Congress did not wish to truncate the presentations of parties entitled to invoke the section 437h expedited, certification procedure. Therefore, we entertain the individual plaintiffs' arguments with respect to the alleged First Amendment rights of career employees. *See California Medical Ass'n*, 101 S.Ct. at 2717 n.6 (1981) ("[T]his court has held [the grant of standing under section 437h] to be limited only by the constraints of Art. III of the Constitution . . . ."); *Buckley v. Valeo*, 424 U.S. at 12 (1976) ("It is clear that Congress, in enacting [section 437h], intended to provide judicial review to the extent permitted by Art. III."). *But cf. Bread Political Action Committee v. FEC*, 50 U.S.L.W. 4291, 4293 (U.S. March 8, 1982) (In the context of considering who may invoke the expedited procedures of section 437h, the Court stated: "We do not assume the maximum jurisdiction permitted by the Constitution, absent a clearer mandate from Congress than here expressed."). The plaintiffs allege that the infringement of executive and administrative employees' right of political abstention leads to greater contributions to corporate PACs and, hence, to greater corporate PAC expenditures. This allegedly causes a relative diminution of the plaintiffs' political voices, which is one of the asserted injuries they seek to redress in this litigation.

Accordingly, we hold that the individual plaintiffs here are qualified to pursue all three constitutional challenges, including the claim that career employees are

unconstitutionally exposed, by reason of the 1976 FECA amendments, to inherently coercive solicitations.

IV. Analysis

A. *Is the asserted imbalance between corporations and labor unions under the 1976 FECA amendments unconstitutional?*

The union plaintiffs claim that Congress, in the 1976 FECA amendments, restricted corporate and labor union PAC activity in an unequal and discriminatory manner, upsetting an alleged long-standing balance between corporations and labor unions, in violation of First and Fifth Amendment strictures.

1. *Background of the 1976 amendments.*

Congressional regulation of corporate political activity began with the Tillman Act of 1907,[14] wherein Congress prohibited corporations from making money contributions in connection with any federal election. Congress has strengthened this prohibition several times since in a continuing effort to free the political system of inordinate and improper corporate influence.[15] It was not until the War Labor Disputes Act of 1943,[16] however, that Congress brought labor unions within the reach of the prohibition.[17]

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[14] 34 Stat. 864.

[15] In 1925, in § 313 of the Federal Corrupt Practices Act, Congress broadened the ban to prohibit all corporate contributions in connection with a federal election. 43 Stat. 1070. In 1947, Congress extended the prohibition to include expenditures as well as contributions, and to cover primaries, conventions, and caucuses. 61 Stat. 159. The following year Congress re-enacted this general prohibition without substantive change as 18 U.S.C. § 610.

[16] 57 Stat. 164, 167.

[17] In the Labor-Management Relations (Taft-Hartley) Act of 1947, Congress made this extension permanent. 61 Stat. 159.

In 1971, Congress, in a major undertaking to reform the federal election laws, enacted the Federal Election Campaign Act. Congress dealt with corporate and labor union political activity in section 205 of the Act,[18] a section originally offered as an amendment by Representative Hansen. Representative Hansen stated that the purpose of the amendment "is to codify the court decisions interpreting [18 U.S.C. § 610], and to spell out in more detail what a labor union or corporation can or cannot do in connection with a federal election." [19] The amendment "draws a distinction between activities directed at the general public, which [the courts have] prohibited, and communications by a corporation to its stockholders and their families, and by a labor organization to its members and their families, on any subject, which the courts have held is permitted." [20] As to the latter, to ensure that contributions are voluntary, the amendment prohibited the use of funds obtained by force, threat of force, job reprisal or discrimination, dues or fees, a safeguard now found at 2 U.S.C. § 441(b)(3)(A). Representative Hansen concluded that the amended "Section 610 strikes a balance between organizational rights [of corporations and labor unions] and the rights of those who wish to retain their shareholding interest or membership status but who disagree with the majority's political views." [21]

In the debate over the Hansen amendment, Congress focused on the respective interests of organization and individual, not on any balancing of corporate and labor influence. Congress appeared satisfied that existing law conformed to the legislature's wish to treat corporations and labor unions evenhandedly so that no alteration by

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[18] This section is now codified at 2 U.S.C. § 441b(b)(2).

[19] 117 Cong. Rec. 43379 (1971).

[20] *Id.*

[21] *Id.* at 43380.

FECA was required.[22] Thus, as amended section 610 read when the Act became law in 1972, corporations were permitted to solicit contributions through their political action committees from their shareholders and their families, and labor unions were allowed to solicit contributions through their PACs from their members and their families.

In the 1976 amendments, Congress added a corporation's "executive or administrative personnel and their families" to those whom a corporate PAC may solicit. This alteration was a direct response to *SUNPAC*, an Advisory Opinion the Commission issued in 1975. In *SUNPAC*, the Commission ruled, *inter alia*, that a corporate PAC could, consistent with the Act, solicit all of the corporation's employees as well as its shareholders. The debate in both Houses confirms that the single purpose of the alteration was to reject the sweeping *SUNPAC* interpretation and restore in large measure the balance thought to exist between corporations and labor unions prior to the Commission's *SUNPAC* opinion.

The House Bill, H.R. 12406, would have allowed a corporate PAC to solicit only its "executive officers" in addi-

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[22] Representative Hansen spoke of his amendment as "spell[ing] out more clearly the rules governing election activities that apply equally to labor unions and corporations." *Id.* at 43379. In a colloquy on the House floor, Representative Dellenback asked Representative Hansen:

> [I]s it your intention by the way you have drafted the amendment to propose that corporations and unions be treated absolutely equally?
>
> Rep. Hansen: That is correct.
>
> Rep. Dellenback: And, further, if a situation is proper for a corporation it is also proper for a union and if it is proper for a union, then it is also proper for a corporation.
>
> I think it is extremely important that what you have here proposed is an amendment that seeks to bring about equity.

Id. at 43382.

tion to the corporation's shareholders. Representative Thompson stated that the House amendment "specifically corrects the FEC's erroneous interpretation" in *SUNPAC*.[23] According to Thompson, *SUNPAC* "drastically modified the equitable balance which had been the national policy established during the 92d Congress."[24] The House Bill would "reestablish[] the congressionally determined balance between interests of the business community and its stockholders, and the interests of the labor community and its membership."[25]

The House Report explicitly states that "[t]he Sun Oil [*SUNPAC*] opinion destroys the intent of the Congress to establish rules that apply equally to labor unions and corporations."[26] The House Bill proposed "three limited clarifications of the law," all of them intended by the Committee to ensure even-handed treatment of corporations and labor unions. In allowing a corporate PAC to communicate with and solicit contributions from its "executive officers," the Committee noted that it viewed "management personnel," like stockholders, "to be among the beneficial owners of a corporation."[27] The main purpose of the bill was stated as follows in the House Report:

> H.R. 12406 continues the rule that unions may only solicit those they represent—their members—and

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[23] 122 Cong. Rec. 8881 (1976).

[24] *Id.*

[25] *Id.* *See also id.* at 8882-83 (remarks of Representative Gaydos) ("[T]he bill seeks to establish a balance between the activities of union and corporate political action committees . . . .") ; *id.* at 8883 (remarks of Representative Maguire) ("All in all, the provision now in the bill appears equitable and symmetrical with respect to the rights and privileges of solicitation of funds by corporations and unions.").

[26] H.R. Rep. No. 917, 94th Cong., 2d Sess. 7 (1976).

[27] *Id.*

> *reaffirms* the intent of the 1971 Congress that corporations must also confine their activities to a *roughly* comparable group—namely, stockholders and executive officers.[28]

The bill also provided that any method of solicitation or communication which the law permitted corporations must also be permitted labor organizations.[29]

The Senate Bill, S. 3065, employed the phrase "executive or administrative personnel" instead of "executive officers," but in all other respects relevant here it tracked the House version.[30] The Senate's intent to overturn the broad *SUNPAC* ruling is clear from the treatment accorded two amendments to the bill offered by Senator Packwood on the Senate floor. Senator Packwood first introduced an amendment which "in essence, lets everybody solicit everybody in the corporation . . . ."[31] Specifically, his first amendment would have allowed a union PAC to solicit non-member employees and shareholders and, symmetrically, would have permitted a corporate PAC to solicit all of the corporation's employees including union members. Senator Packwood acknowledged the amendment "pretty much, puts the situation back where the Federal Election Commission had left it with their rulings in the creation of what was known as the *SUNPAC* decision." But he believed it treated labor unions and corporations "equitably."[32] The Senate, without debate, rejected this amendment, 40-45.[33]

Senator Packwood introduced next "the middle ground amendment," a proposal which would have extended cor-

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[28] *Id.* (emphasis added).

[29] *Id.*

[30] *See* H.R. Conf. Rep. 1057, 94th Cong., 2d Sess. 59-62 (1976).

[31] 122 Cong. Rec. 6958 (1976).

[32] *Id.*

[33] *Id.*

porate and union solicitation to middle level employees. Conceding that strong labor opposition to the *SUNPAC* ruling justified some restrictions on corporate solicitation of employees, Packwood nevertheless pointed out that under the Senate Bill "nonsupervisory, nonunionized employees, who are half of the work force of the major corporations in this country, cannot be solicited by the union and cannot be solicited by the employer." [34] These middle level employees, Packwood urged, have a stake in what both corporation and labor union do that affects them, therefore both union PACs and corporate PACs should be allowed to solicit them. Other Senators expressed concern over the potential for coercion, actual and perceived, in permitting solicitation of these nonsupervisory, non-union employees.[35] Although Packwood attempted to assure his colleagues that coercion was illegal under present law and would remain so under his amendment, the Senate rejected this amendment, too, 33-47.[36] Senator Dole, speaking of the provision concerning PACs just before the vote on the entire bill, stated, "Although the compromise reached with respect to solicitation of funds from employees may not be totally consistent with the SUNPAC decision, it probably also represents a fair settlement of the issue." [37]

The substitute bill as reported out of conference employed the Senate language "executive or administrative personnel." The Conference Report defined "executive or administrative personnel" as "employee[s] who [are] paid on a salary, rather than hourly, basis and who

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[34] *Id.* at 6959.

[35] *See id.* at 6959-60 (remarks of Senator Bumpers); *id.* at 6960 (remarks of Senator Brock).

[36] *Id.* at 6962.

[37] *Id.* at 7923.

ha[ve] policymaking, managerial, professional, or supervisory responsibilities." [38] The Report explained further:

> The term "executive or administrative personnel" is intended to include the individuals who run the corporation's business, such as officers, other executives, and plant, division, and section managers, as well as individuals following the recognized professions, such as lawyers and engineers, who have not chosen to separate themselves from management by choosing a bargaining representative; but is not intended to include professionals who are members of a labor organization, or foremen who have direct supervision over hourly employees, or other lower level supervisors such as "strawbosses".[39]

Concerning the balance Congress intended to restore in these amendments, the Conference Report contains only a passing reference to "the general rule inherent in the plan of the entire section—that unions insofar as they are employers,[40] stand in the same shoes as corporations . . . ." [41] Congress was not unaware, however, that the balance struck in 1976 was different from the one that existed prior to the *SUNPAC* ruling. In presenting the Conference Bill to the House, Representative Hays stated:

> The individuals . . . whom a corporation may . . . solicit[] for contributions to a political fund was *broadened* to include professional employees who are not represented by a bargaining agent and supervisory employees other than foremen who directly supervise rank-and-file employees.[42]

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[38] H.R. Conf. Rep. 1057, 94th Cong., 2d Sess. 62 (1976).

[39] *Id.*

[40] Footnote added. "Employers" should read "solicitors," because Congress did not authorize union PACs to solicit nonmember employees.

[41] H.R. Conf. Rep. 1057, 94th Cong., 2d Sess. 64 (1976).

[42] 122 Cong. Rec. 12198 (1976) (emphasis added). Remarks of Representative Brademas, however, indicate that some members be-

Representative Brademas concluded that Congress has restored the *ante-SUNPAC* balance "in a manner that is fair and evenhanded . . . . [I]f the word 'fairness' implies a balancing of rights, this bill represents an equitable balance between the rights of corporations and labor unions. It is the product of deliberation, negotiation and compromise." [43]

In sum, our review of the relevant legislative history convinces us of two things: (1) Congress intended to

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lieved mistakenly that the 1976 amendments simply restored the *status quo ante*.

> Congress [in 1971] sought to establish a balance between the political activities allowed to corporations and labor unions in order that the extent of political activities carried on by either kind of entity might not burgeon so as completely to overwhelm the activities of the other.
>
> Congress specifically did not allow either corporations or labor unions to cross-solicit contributions from each other's respective constituencies. *Because the rationale for allowing a corporation to play a role in Federal elections was the legitimate interests of its owners and management, Congress restricted the solicitation rights of a corporation to its stockholders and managerial employees.* And because the rationale for allowing labor unions to play a role in Federal elections was the legitimate interests of its members, Congress restricted the solicitation rights of a labor union to its members.
>
> Mr. Speaker, this system worked well for a number of years, until last winter when a majority of the members of the Federal Election Commission arrogated to themselves the right to change the rules. . . . [W]hat the conference committee has done is to restore the rules which governed Federal elections from 1971 until the Commission's Sun Oil decision last December.

Id. at 12203-04 (emphasis added). The rationale Representative Brademas recites fits more neatly the 1976 amendments *adding* executive and administrative employees than the 1971 Act which *by its terms prohibited* corporate PACs from soliciting all non-stockholder employees.

[43] *Id.* at 12204.

overrule the *SUNPAC* decision in substantial part and re-establish *a* balance similar, but not identical, to the one Congress codified in 1971; (2) there was a general consensus that the amendments achieved this purpose and did so equitably.[44]

2. *The alleged imbalance.*

Plaintiffs, in light of the legislative history just recounted, do not claim that Congress in 1976 *intended* to tip the balance in favor of corporations. Rather, they accuse Congress of lacking the prescience to comprehend the *effect* of unleashing corporate PACs to solicit career employees: an "explosive" growth both in the number of corporate PACs and in their influence in federal elections, disproportionate to that of union PACs.

Plaintiffs cite the following figures and invite comparison. In 1975, 139 corporate PACs raised $5.8 million; 226 union PACs raised $18.5 million. By 1980, however, there were 1204 corporate PACs with a combined campaign chest of $34 million. The number of labor PACs increased in the same period only incrementally to 297; they raised $26 million.[45] Plaintiffs estimate that 90% of corporate PAC funds are derived from executive and administrative employees.[46] Plaintiffs' figures do not inform us how many career employees were open to solicitation pre-1976 as share-

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[44] Ironically, members who rose to protest the unfairness of the amendments objected to what they perceived as a pro-labor bias in the bill. *See id.* at 12204 (remarks of Representative Rhodes); *id.* at 12206 (remarks of Representative Rousselot); *id.* (remarks of Representative Devine); *see also* H.R. Rep. No. 917, 94th Cong., 2d Sess. 92 (1976) (minority views of Representative Frenzel); *id.* at 94-96 (minority views of Representative Moore).

[45] Brief for Plaintiffs at 14, 16 Fig. 1.

[46] *Id.* at 18 & n.6: "Discovery of the four corporations in the District Court revealed that the average proportion of their PAC funds derived from employee contributions was 91.5% in 1979." Defendants do not specifically controvert this estimate.

holders.[47] Nor, taking into account that labor union PACs just a few years ago were more prevalent, wealthier, and more powerful than corporate PACs, do plaintiffs entertain the possibility that the relative strength of corporate and labor PACs may swing pendulum-like in step with the political fortunes of the day. Plaintiffs demonstrate a connection in time (and argue a causal connection) between the *SUNPAC* ruling, the 1976 amendments, and the proliferation of corporate PACs. It is the statute, they argue—specifically the provision authorizing corporate solicitation of career employees—that "allows and invites a large and growing imbalance between corporate and union PAC funds."[48]

Although plaintiffs recite a host of figures to dramatize this disparity, the imbalance of which they complain is not purely one of dollars and cents. Instead, the imbalance Congress is said to have created in 1976 is *institutional*, a matter of *capacity*, and thus outside the power of labor unions to correct. According to plaintiffs, there simply are many more major corporations (and many more career employees to be solicited) than there are major labor unions (and union *employees*).[49] Be-

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[47] No doubt there were pre-1976 and are today many career employees with shareholdings in the corporations that employ them. However, the materials before us do not indicate the extent to which the category "career employees" overlaps with the category "shareholders" and we do not rely in our analysis on any speculation in this regard.

[48] Brief for Plaintiffs at 20.

[49] Plaintiffs cite these figures:

> [T]here are 1420 major corporations in the nation each with 2,500 or more employees . . . . Among them at least 125 (5%) at each company are administrative and executive personel [sic]. . . . The combined employment force of these large corporations is 18.9 million workers . . . ; the 5% executive and administrative portion of that work force represents 945,000

career workers whom these major corporations can tap for employee-derived corporate funds used in federal elections.

Brief for Plaintiffs at 14. By Comparison, "the combined number of national and local unions [with 125 or more *employees*] is only 107, and they have a total workforce of only 23,645 employees." *Id.* at 15 (emphasis added).

Although the figures plaintiffs cite are provocative, they are less than fully persuasive of the institutional imbalance of which plaintiffs complain in this suit. The 1976 amendments plaintiffs challenge allow a labor PAC to solicit its *members and their families, albeit not non-member employees.* Union members, whether or not employees of the union, certainly form a substantially larger pool from which labor PACs may solicit contributions than union employees. Plaintiffs do argue elsewhere that because career employees are solicited under inherently coercive circumstances, *see* Part B *infra*, they are more likely to contribute than union members solicited by union PACs, and also more likely to contribute a greater amount of money than the average union member is willing or able to contribute.

The Commission invites us to look at the same figures from another angle. First, the balance, or "parity," between corporate and labor PAC funds plaintiffs say existed before *SUNPAC* and the 1976 amendments was, at least numerically, no such thing ($18.5 million for labor PACs in 1976, compared to $5.8 million for corporate PACs; 226 labor PACs in contrast to 139 corporate PACs). This, of course, refutes only any basis for a claim of pre-existing parity in funds collected and number of PACs. As a matter of capacity, there may have been a parity between shareholders and union members. *See* H.R. Rep. No. 917, 94th Cong., 2d Sess. 7 (1976) ("There are as many corporate shareholders as there are union members."). Nonetheless, compared with the 1976 situation, the 1980 disparity in favor of corporate PACs ($35 million to $26 million) does not appear startling.

Second, the Commission points out that, accepting plaintiffs' estimate that 90% of corporate PAC funds are employee-derived, without the 1976 amendments authorizing such solicitation corporate PACs would have raised a paltry $3.5 million compared to the $26 million labor PACs raised. Brief for Defendants at 26. The Commission suggests that, far from creating an imbalance, the 1976 amendments brought corporate and labor PAC funds roughly in line with each other. But see note 47 *supra*.

Finally, amici in No. 81-1044 alert us to the massive amounts raised and spent by PACs not connected to either a corporation or

cause most major corporations have not yet set up a political action committee,[50] plaintiffs' argument continues, the chasm between corporate and labor PAC funds promises to widen even more.

Plaintiffs do not object, however, to the proscription on labor PAC solicitation of non-member union employees (or non-member corporate employees). Even if Congress drew the 1976 amendments in a facially equal manner (corporate and labor PACs may solicit their respective career employees; or corporate and labor PACs alike may solicit all corporate employees, regardless of union membership, and all shareholders), plaintiffs would still press their discrimination claim.[51] In sum, the union plaintiffs challenge here congressional action that frees corporate PACs to amass funds that labor union PACs allegedly could not attract even if they were permitted to try.

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labor union, such as trade association, cooperative, and ideological PACs. The Commission reported that this third group spent more money in 1980 in federal elections than all corporate and labor PACs combined. Brief for Amici General Electric, *et al.* at 5 & n.2.

[50] "More than two-thirds of Fortune's 1000 leading industrial corporations do not yet have a PAC." Brief for Plaintiffs at 14. Again, the inferences plaintiffs draw are not inevitably correct. According to the FEC, the rate of growth of corporate PACs has declined recently. Further, amici in No. 81-1044 point out that the smaller the corporation, the less likely it will establish a political action committee; if formed, the size of the PAC will likely correspond to the size of the firm. Brief for Amici General Electric, *et al.* at 5. Thus, the estimate of a total workforce of nearly a million executive and administrative officers susceptible to corporate PAC solicitation, *supra* note 49, may be highly exaggerated. *See also* note 47 *supra* (shareholding corporate officers are open to solicitation without regard to their status as career employees).

[51] We assume that a substantial number of union employees are also members of the union for which they work so that a FECA amendment authorizing labor PACs to solicit their nonmember employees would not result in an appreciable increase in labor PAC funds. At oral argument counsel for IAMA estimated that 900 of the 1100 IAMA employees are members of the union.

3. *The standard of review.*

The union plaintiffs argue that the 1976 amendments, which authorize labor PACs to solicit their members but which authorize corporate PACs to solicit their career employees in addition to their shareholders, violate the equal protection component of the Due Process Clause of the Fifth Amendment.[52] They argue conjunctively that this disparate treatment violates their First Amendment rights. Urging linked consideration of these two constitutional safeguards, plaintiffs rely on decisions focused on the "intersection" of equal protection and First Amendment guarantees, most notably, *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Police Department v. Mosley*, 408 U.S. 92 (1972). They maintain that the 1976 amendments must be scrutinized strictly and assert that the Commission has not adequately justified the amendments' disparate impact on corporate and labor PACs.

While heightened scrutiny often attends a legislative classification alleged to impinge on First Amendment interests,[53] we reject plaintiffs' argument that the most stringent review standard should apply in this case.[54] Decisions in point may lack perfect consistency and

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[52] Because plaintiffs challenge congressional action, the Fifth Amendment rather than the Fourteenth Amendment governs. Implicit in the Due Process Clause of the Fifth Amendment, the Supreme Court has several times noted, is an equal protection guarantee approximating the explicit guarantee contained in the Fourteenth Amendment, Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

[53] *See, e.g.*, Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1122-23 (D.C. Cir. 1978) (*en banc*).

[54] *Cf.* Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 102 S.Ct. 434, 436, 438 (1981) (subjecting to "exacting judicial scrutiny" a limitation on the size of contributions to committees formed to support or oppose ballot measure referenda, a restriction the Court's majority viewed as directly encroaching on political expression).

crystal clarity, but they do reveal that the nature and quality of the legislative action at issue determine the intensity of judicial review of intertwined equal protection, First Amendment claims.[55] We note in that light that the particular congressional action plaintiffs assail does not encroach directly or, on its face, place limits on any individual's speech or participation in the electoral process. In this respect, neither *Mosley*, involving an ordinance allowing one group, but not others, to picket, nor *Buckley v. Valeo*, involving limitations on campaign contributions and expenditures, nears plaintiffs' mark. Moreover, we underscore again that plaintiffs do not seek for union PACs the permission Congress granted corporate PACs to solicit career employees. Rather, plaintiffs want to tighten or reinstate a governmental limitation on political activity, *i.e.*, they would preclude corporate PACs from soliciting career employees, in order to maintain a balance between electoral messages spread by corporations and those spread by unions.[56]

Mosley itself enunciated review standards that were not the most exacting,[57] and *Buckley v. Valeo* drew dis-

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[55] *See particularly* Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286 (7th Cir. 1981) (Wisdom, J., sitting by designation), *possible jurisdiction postponed*, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 80-896); *cf.* National Black United Fund, Inc. v. Devine, 667 F.2d 173, 179 (D.C. Cir. 1981).

[56] *But cf.* Buckley v. Valeo, 424 U.S. at 48-49 ("concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"), *quoted in Citizens Against Rent Control*, 102 S.Ct. at 437.

[57] The Court has recently restated the *Mosley* standard as follows: "[T]he Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." Carey v. Brown, 447 U.S. 455, 461-62 (1980). *See also* Gunther, the Supreme Court, 1971 Term—Foreword: In Search of

tinctions bearing on the rigorousness of review based on the character of the several legislative proscriptions the Court scrutinized. *See, e.g.*, 424 U.S. at 95-96. We are therefore confident that the matter before us does not call for a review standard more demanding than this elevated, but not strictest,[58] test: the challenged legislative action must bear a substantial relation to an important governmental interest.[59]

4. *The governmental interest.*[60]

Plaintiffs phrase their objection to the 1976 amendments in terms of the *ends* Congress may have sought to achieve by permitting corporate PACs to communicate

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Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 17-18 (1972) (suggesting that the Court, in explicating the standard of review, deliberately avoided traditional equal protection rhetoric).

[58] The strictest standard demands a "compelling" governmental interest and a classification "necessary" to achieve the compelling interest. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972); Dunn v. Blumstein, 405 U.S. 330, 337 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). *See generally* Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1067, 1087-1132 (1969).

[59] Plaintiffs further urge that this case can be accommodated within the rubric of case law involving the right to vote, a fundamental right triggering strict scrutiny, at least when the state's restriction is direct and substantial. *See* Brief for Plaintiffs at 24-25. But it stretches too far to characterize the claims before us as involving the right to vote; rather, plaintiffs charge Congress with the creation of a scheme regulating unevenly political expression in connection with federal elections.

[60] We do not review the 1976 amendments in a vacuum, but in light of the Act as enacted in 1971 and altered by the 1975 *SUNPAC* ruling. The administrative gloss on the Act the Commission supplied in *SUNPAC* was the *status quo* on which Congress operated in 1976. Congress saw *SUNPAC* as the problem and acted to alter that ruling by permitting corporate PACs to solicit only their career employees, not their entire workforce, as *SUNPAC* allowed.

with and solicit executive and administrative employees.[61] But their objection is more appropriately addressed to the *means* Congress chose to serve an indisputably important governmental interest: impartial FECA *treatment* of corporations and labor unions.[62] It confounds means and ends scrutiny to demand, as plaintiffs do, that Congress explicate a substantial government interest in adding career employees to the pool of permissible corporate solicitees. As developed earlier,[63] the 1976 amendments at issue were designed to restore a balance to FECA's treatment of corporations and labor unions, a balance the Commission in its *SUNPAC* ruling had upset. It is true that the balance Congress struck in 1976 differs from the one arrived at in 1971. But the goal of Congress has remained the same.[64] Thus, whether the 1976 amendments survive constitutional review turns on the degree of precision with which Congress has achieved its unquestionably proper purpose: does the legislative scheme of section 441b(b)(2), as amended in 1976, bear a substantial relation to the important governmental interest in applying the federal election laws even-handedly to labor unions and corporations?

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[61] Brief for Plaintiffs at 29-30, Reply Brief at 7.

[62] While Congress intended to treat corporations and labor unions alike, it did not intend to *equalize* the relative resources or influence of corporations and organized labor.

[63] *See* text at pages 17-22 *supra*.

[64] *Compare* 117 Cong. Rec. 43382 (1971) (colloquy between Representatives Dellenback and Hansen), *quoted at* note 22 *supra*, and 122 Cong. Rec. 12198 (1976) (remarks of Representative Brademas), *quoted at* note 42 *supra*, *with* text accompanying notes 23-44 *infra*.

5. *Means scrutiny: to what extent are corporations and labor unions similarly situated for the purpose at hand?*

Congress apparently did not consider the difference in capacity between corporate and labor PACs when it framed the 1976 amendments. But, as we observed earlier, no disparity in favor of corporations existed in 1976.[65] Although plaintiffs seem to charge Congress with a duty to prevent such a disparity from developing,[66] their more basic complaint poses an obvious question: if Congress in the 1976 amendments intended to restore the balance upset by the Commission in *SUNPAC*, why did it not simply reaffirm the 1971 scheme, under which unions were permitted to solicit their members, and corporations their shareholders? Why did Congress add career employees to those whom a corporate PAC may solicit? Two related considerations lead us to reject plaintiffs' argument that this discrepancy renders the statute unconstitutional.[67]

First, Congress found, and plaintiffs do not contest, that executive and administrative employees share with stockholders a stake in the corporation's well-being.[68]

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[65] *See* text accompanying notes 45-50 *supra*.

[66] *But see* note 56 *supra*.

[67] Conceivably, Congress might have believed that only by permitting corporate PACs to solicit career employees would there be a rough balance in the strength of corporate and labor union PACs. We find no support for this proposition in the legislative history. To restore a balance, Congress overruled *SUNPAC* to the extent that it authorized corporate solicitation of hourly employees. Congress did not permit solicitation of career employees out of any stated concern for an equilibrium between corporations and labor unions. Rather, Congress focused on the relationship of the career employee to his corporation, comparing that relationship to the shareholder-corporation relationship in terms of a community of shared interests. *See* text accompanying notes 68-69 *infra*.

[68] *See* H.R. Rep. No. 917, 94th Cong., 2d Sess. 7 (1976), *quoted at* text accompanying notes 27-28 *supra*.

Recognizing a corporation's "right" to communicate with and solicit those who share an identity of interest with it,[69] Congress simply extended the exercise of this right to communications with and solicitation of career employees. Congress thus tendered a sensible response to *SUNPAC*: it cut back the Commission's decision by excluding from corporate solicitation the bulk of the workforce, but it recognized that upper echelon personnel may identify with the corporation at least as much as shareholders do.

Second, in attempting to treat corporations and labor unions equally, Congress believed it was necessary in 1976—as it was in 1971—to take into account their structural differences. Technically, shareholders own the corporation. While union members do not "own" their union in the same technical sense, there is more than a kernel of truth in describing members as "owners." The union membership resembles a corporation's stockholders in that each group is the source of legitimacy and power for the organization's management and leadership. Thus, it follows that Congress would consider sound the analogy: union members are to their union as shareholders are to their corporation. In theory, directors, officers, and upper management run the corporation pursuant to the wishes of the shareholders. But corporate democracy is in many respects more theoretical than real. It is, if anything, more likely that a corporation's career employees will identify with the corporate direction, purpose, and welfare than will a shareholder who does not own a controlling interest. Congress took note of this likelihood in 1976 and thought it reasonable to allow a corporate PAC to solicit these employees. If there is an appropriate anal-

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[69] *See, e.g.*, text accompanying notes 20-21 *supra* (intent of 1971 Hansen amendment); note 42 and text accompanying note 43 *supra* (congressional recognition in 1976 of corporate interests). *See also* First National Bank of Boston v. Bellotti, 435 U.S. 765, 776-83 (1978) (corporate speech entitled to First Amendment protection).

ogy, it might be either: career employees are to their corporation as union leadership is to its union, or union career employees are to their union. To achieve symmetry in 1976, Congress might have authorized union PACs to solicit their leadership or their career employees. However, this would have scant practical effect since it appears that the vast majority of union career employees and union leaders are also union members.[70] As has been noted, the House Report indicates Congress believed the 1976 classification was drawn fairly:

> H.R. 12406 continues the rule that unions may only solicit those they represent—their members—and *reaffirms the intent of the 1971 Congress that corporations must also confine their activities to a roughly comparable group*—namely, stockholders and executive officers.[71]

Our conclusion that differences in organizational structure allow Congress to shape the election laws to reflect those differences is supported by two recent decisions involving equal protection challenges to FECA. In *Bread Political Action Committee v. FEC*, 635 F.2d 621 (7th Cir. 1980) (*en banc*), *rev'd on other grounds*, 50 U.S.L.W. 4291 (U.S. March 8, 1982), a trade association PAC argued that section 441b(b)(4)(D) deprived it of equal protection because under the statute, a trade PAC must obtain prior approval of a member corporation before soliciting that corporation's permissible solicitees. In rejecting that claim, the court pointed out that

> the somewhat dissimilar treatment of corporations, labor organizations, membership organizations and

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[70] *See* note 51 *supra*.

[71] H.R. Rep. No. 917, 94th Cong., 2d Sess. 7 (1976) (emphasis added).

> trade associations under Section 441b(b)(4) follows from the rather obvious facts that each of the different groups has a different structure and a different kind of constituency and that each requires somewhat different regulations to curb abuses the Act was intended to halt.

635 F.2d at 630.[72] And in *California Medical Ass'n v. FEC*, 101 S.Ct. 2712 (1981), the Supreme Court rejected an equal protection claim that section 441a(a)(1)(C) imposed a greater burden on unincorporated associations and individuals than on corporations and labor unions.[73] The Court commented:

> The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process.

101 S.Ct. at 2724.

Congress might have established a different scheme. Indeed, it might simply have directed a return to the 1971 "balance." We are not convinced, however, that the

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[72] The court concluded that plaintiffs "fail[ed] to demon trate how trade associations and labor organizations are 'similarly situated' parties." 653 F.2d at 651. We do not conclude that corporations and labor unions are so "dissimilarly situated" that equal protection scrutiny may be avoided. Indeed, the legislative scheme of FECA indicates that Congress considered them in many respects "similarly situated." *See, e.g.*, §§ 441b(a), 441b(b)(2), (5).

[73] Section 441a(a)(1)(C) prohibits individuals and unincorporated associations from contributing more than $5,000 in any calendar year to any multicandidate PAC.

1971 balance would be any more "equal" than the one struck in 1976.[74]

It is unlikely Congress will ever be able to achieve a perfect balance between the relative influence of corporations and labor unions in federal elections. In any event, the Constitution, as historically and currently interpreted, does not afford any guarantee against one person's or group's ability to fund more speech than can another. In fact, far from imposing on Congress an obligation to equalize the voices of corporate and labor PACs, the Constitution, as the Supreme Court now reads it, may forbid Congress to act in such a manner. *See Buckley v. Valeo*, 424 U.S. at 48-49, *quoted in Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 102 S.Ct. 434, 437 (1981). Congress, in 1971 and 1976, attempted to treat corporations and labor unions in a relatively comparable manner. We hold that the 1976 amendments the plaintiffs challenge are substantially related to this important objective, and therefore do not deprive plaintiffs of equal protection.

B. *Does the statute impair career employees' First Amendment right of political abstention by permitting the corporate PAC solicitation as detailed in the record?* [75]

In their second constitutional claim plaintiffs champion the First Amendment right of career employees to polit-

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[74] *See* notes 49-50 *supra*.

[75] The question certified by the district court has been restated with sophistication in the parties' briefs. The district court asked simply whether the provision authorizing corporate PAC solicitation of executive and administrative employees violated the First Amendment rights of those employees. Plaintiffs state, elaboratively, that the statute impairs career employees "First Amendment liberty of political abstension" "if [it] authorizes a corporation to pressure its employees to make payments to the company PAC." Brief for Plaintiffs at 31; Reply Brief at 8. Plaintiffs would thus focus our atten-

ical abstension. Plaintiffs allege that corporate PACs solicit their executive and administrative personnel under circumstances that are inherently coercive even though statutorily unobjectionable.[76] They argue that because the nature of the employment relationship renders these solicitations "pregnant with coercion," career employees often must surrender or compromise their rights of political association and expression so as to avoid incurring the

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tion on the detailed findings of fact they rely upon to demonstrate the inherently coercive nature of corporate PAC solicitation of executive and administrative personnel. We address this evidence, *see* text accompanying notes 78-85 *infra*, but note at the outset plaintiffs' apparent concession that absent a finding of coercion this constitutional claim cannot succeed. As we explain later, *see* pages 39-43 *infra*, we conclude that the record before us falls far short of establishing coercion.

The Commission rephrases the question this way: "whether *Congress's decision to prohibit coercive* solicitations of corporate executive and administrative personnel is sufficient to protect their rights under the first amendment." Brief for Defendants at 35 (emphasis added). Plaintiffs, however, argue that Congress has *permitted* solicitation under *inherently* coercive circumstances. We respond in this section to the issue plaintiffs tender.

[76] Originally, plaintiffs alleged in their administrative complaint that (1) the inherently coercive solicitation practices of corporate PACs (group solicitation, in-person solicitation, and supervisor solicitation) violated § 441b(b)(3); and (2) because inherently coercive supervisor solicitations beget involuntary contributions—contributions derived from the employment relationship—the Commission should pierce the career employee veil and treat as *corporate* contributions the *individual* contributions of executive and administrative employees. So treated, the contributions would run afoul of the Act's general ban on corporate contributions contained in § 441b(a). The Commission's interpretation of the Act—that it proscribes only what is specifically described in § 441b(b)(3)(A)-(C)—was upheld by the district court as reasonable and consistent with law. Mem. Op., *supra* note 7, at 5-8, App. 14-17. The district court's decision was affirmed by order of this *en banc* court. International Ass'n of Machinists & Aerospace Workers v. FEC, No. 81-1044 (D.C. Cir. Oct. 26, 1981) (*en banc*). Thus plaintiffs are left to argue that the solicitation the statute permits is rendered impermissible by the Constitution.

displeasure of their corporate superiors. Plaintiffs conclude that because Congress in the 1976 amendments explicitly authorized corporate solicitation of executive and administrative employees, this corporate PAC activity bears the imprimatur of the state and therefore contravenes the First Amendment.

Essential to plaintiffs' claim of a *constitutional* violation is a "governmental (state) action" foothold. The Commission maintains that a decision by Congress simply to permit corporate PACs to solicit career employees does not stamp as "state action" otherwise private corporate conduct. In its most recent statement on point, the Supreme Court rejected expansive application of the concept that state action may be indicated by state authorization of private sector activity. The Court summarized: "Our cases state 'that a State is responsible for [the] act of a private party when the State, by its law, has compelled the act.' This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978) (UCC-authorized sale of bailed goods to satisfy warehouseman's lien is not state action and therefore need not be attended by constitutional guarantees regarding minimal hearings). We pretermit a decision on the state action question, however, in view of the not altogether settled state of the law, *cf. Abood v. Detroit Board of Education*, 431 U.S. 209, 218 n.12 (1977); *Reitman v. Mulkey*, 387 U.S. 369 (1967), and because we conclude that even if the requisite state action were present, plaintiffs' challenge would not succeed.

In the discussion that follows we explain why we reject plaintiffs' argument that allowing corporate PACs to solicit executive and administrative personnel sanctions solicitation that is "inherently coercive." On the record before us, and in view of the safeguards against coercion with which Congress has brigaded corporate PAC solici-

tation,[77] we cannot conclude that such solicitation inevitably forces career employees to compromise their political beliefs in order to avoid jeopardizing their corporate positions.

1. *Is solicitation of career employees inherently coercive?*

Plaintiffs complain that "employees are donating to the corporate political fund because of the employment relationship and its pressures—pressures which the company solicitations consciously and effectively exploit."[78] They add that because there is an "inherently sensitive and unequal relationship between an employer and his employees[,] . . . these solicitations are 'pregnant with coercion.'"[79] In particular, plaintiffs argue that the supervisor solicitation, in-person solicitation, and group solicitation methods corporate PACs employ[80] are inherently coercive, notwithstanding literal observance of the solicitation restrictions in section 441b(b)(3)(A)-(C).[81]

To demonstrate that these methods of solicitation are *per se* coercive, plaintiffs lean heavily on statistics assembled in the record. Plaintiffs point out that executive and administrative employees "give to the corporate po-

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[77] *See* § 441b(b)(3)(A)-(C), *supra* note 5.

[78] Brief for Plaintiffs at 31.

[79] *Id.* at 36.

[80] The solicitation methods of the four corporate PACs examined by the district court are summarized in the certified Findings of Fact, 1-79, 93-102, App. 26-52, 55-57.

[81] Corporate PACs may not use force or threat of force, job discrimination, or financial reprisal in solicitating career employees. Also, corporate PACs routinely afford employees they solicit a rough analogue of *Miranda* rights: The PAC informs the solicitee of the purpose of the PAC and the right to refuse to contribute without fear of reprisal.

litical fund at rates [82] and in amounts [83] far beyond those which obtain when donors are not solicited to give

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[82] Footnote added. The picture plaintiffs paint in their brief is misleading. They cite statistics demonstrating that "senior executives," "senior management employees," "executive employees," presidents, and officers contribute at rates between 60 and 95%, compared to a rate of less than one percent for shareholders. The figures drop considerably when one considers the percentage of *all* executive and administrative personnel that contribute to their corporation's PAC. The district court found that of those career employees solicited to contribute to their corporation's PAC, a substantially smaller percentage chose to contribute. Findings of Fact 63 (Dart: for 1978, 15.8%; 1979, 16.8%; 1980, 11.8%); 66 (Eaton: for 1977, 51.8%; 1981, 45%); 68 (United Technologies: for 1978, 6.6%; 1979, 2.9%; 1980, 7.8%); 71 (Winn-Dixie: for 1978, 10.2%; 1979, 14.5%; 1980, 15%), App. 49-51. These figures generally fall within rates the Supreme Court has considered in an analogous situation to indicate an absence of coercion. Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 418 n.30 (1972) ("Indeed, the amount of individual contributions actually collected by PAC evidences that it successfully informed CIO members that donations were not mandatory assessments."). The Court estimated in *Pipefitters* that 800,000 of five million CIO members contributed to PAC. We do not rely on high or low rates as litmus indicia of coercion or its absence; we simply point out that the figures in the record do not substantially aid plaintiffs' case.

[83] Footnote added. Plaintiffs rely on the district court's Findings of Fact 73-79, 84, App. 51-53, indicating that career employees contribute in amounts ten to twenty times as large as the average national contribution to presidential candidates (for 1976, $26.86; 1980, $49.50). Among "senior management" or "senior executives," of course, the amounts are larger still. *Id.* Shareholders of Dart Industries, by comparison, contributed in 1979 an average of $27.45 to Dart PAC. Findings of Fact 85, App. 53. These statistics are not surprising. Because executive and administrative employees, especially "senior management" officials (many of whom may well be shareholders and subject to solicitation in that capacity), are likely to have substantially higher incomes than the average adult, one might expect the amount the career employee contributed to be commensurately larger. Then too, there is the variable difficult to reduce to figures: the degree of affinity a career employee has toward his corporation, and the enthusiasm he shows for its PAC. *See* text at pages 31-33 *supra*.

to the institution that employs them." [84] We demur to this statement. Plaintiffs infer from the figures they cite that career employees contribute at such rates and in such amounts because of the "employment relationship" and its inherent pressures. But this inference is not the only or even the plainest one the statistics suggest. From the very same figures one could argue with equal force that career employees contribute to their corporate PACs out of a desire to further what they perceive to be their own best interests or the best interests of the corporation, and because they have the wherewithal to do so, not because they are coerced or intimidated. Congress considered executive and administrative personnel, like shareholders, to have a beneficial stake in the welfare of the corporation; it therefore expressly permitted corporate PAC communications with and solicitation of these higher level employees.[85] As noted earlier, it may be that, in general, executive and administrative employees are more likely to identify with their employer (and therefore the employer's political interests as expressed through its PAC) than is a non-employee shareholder with the corporation whose shares he has purchased in the market.[86] On the record before us, it suffices to say that the proof plaintiffs offer falls woefully short.

Plaintiffs' attempt to extract support from case law fares no better. They rely on two Supreme Court decisions rejecting constitutional challenges to restrictions Congress placed on the political activities of public employees: *Ex Parte Curtis*, 106 U.S. 371 (1882); *Civil*

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[84] Brief for Plaintiffs at 33.

[85] *See* text at pages 18, 21-22 *supra*. *See also* National Right to Work Comm., Inc. v. FEC, 665 F.2d 371, 375 n.9 (D.C. Cir. 1981) ("[Section] 441b(b)(4)(A) restricts corporations and labor organizations to the solicitation of those individuals likely to be harmed by corporate or union overindulgence in the political arena.").

[86] *See* text accompanying notes 68-71 *supra*.

Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973), *reaffirming United Public Workers v. Mitchell*, 330 U.S. 75 (1947). In *Curtis* the Court upheld against constitutional assault a statute prohibiting certain federal employees from "requesting, giving to, or receiving from, any other officer or employee of the government, any money or property or other thing of value for political purposes." 106 U.S. at 371. In *Letter Carriers*, the Court upheld against a second major First Amendment challenge (the first was in *Mitchell*) the Hatch Act's ban on federal employee political activity.

We note a certain irony in plaintiffs' resort to these cases. In both, the challengers raised constitutional objections to restrictions on political activity imposed by Congress. The Court rejected those objections. Plaintiffs serve up these cases in an effort to persuade us that Congress not only may but must restrict because the First Amendment so commands. In *Letter Carriers* as in *Curtis*, the Court deferred to the congressional judgment that "partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences." 413 U.S. at 564. While the Court recognized the legitimacy of congressional action to secure federal employees from "pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out of their own beliefs," 413 U.S. at 566, the Court never suggested that Congress was obliged by the Constitution to impose such protection.[87]

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[87] *See also* Mem. Op., *supra* note 7, at 6, App. 15 (commenting with respect to *Letter Carriers*: "The need to remove political pressures was justified not as a means of protecting the first amendment rights of government employees, but to advance the highly valued public policy of non-partisan administration."). Plaintiffs also quote out of context Martin Tractor Co. v. FEC, 627 F.2d 375,

In short, we find scant instruction for the problem at hand in cases deferring to a legislative decision alleged to invade First Amendment rights to associate and to participate in political activities. With regard to the issue we confront, the Court's firm rejection of the First Amendment challenges in *Letter Carriers* suggests to us only that the area is one in which the considered decision of Congress should attract the judiciary's attention and respect. We therefore turn to the views expressed in Congress relevant to the coercion potential in corporate PAC solicitation of career employees.

2. *The considered judgment of Congress and the deference due it*

Congress was aware of the potential for coercion of career employees when it permitted their solicitation by corporate PACs subject to specified safeguards. Legislative concern that unrestricted solicitation by corporations and labor unions would trench on an individual's political beliefs was a major force behind the restrictions Congress enacted in the Hansen amendment of 1971. Representative Hansen, speaking of corporate PAC solicitation of shareholders and labor PAC solicitation of union members, stated:

> This [amendment] is intended to insure that a solicitor for COPE or BIPAC cannot abuse his organizational authority in seeking political contributions. *Of course, nothing can completely erase some resid-*

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387 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980), stating that "this Court has already recognized the sensitive nature of PAC solicitation in the inherently coercive context of employer-employee relationships." Reply Brief at 9. But the "solicitation" to which the quote referred was corporate PAC solicitation of *hourly* employees. FECA strictly confines solicitation of hourly employees to two written communications within one year, addressed and mailed to the employees at their home, and designed so that anonymity may be guaranteed for those who either do not contribute or contribute less than $50. Section 441b(b)(4)(B).

> *ual effects on this score*, any more than the law can control the mental reaction of a businessman asked for a contribution by an individual who happens to be his banker, or of a farmer approached by the head of his local farm organization. The proper approach and the one adopted here, is to provide the strong assurance that a refusal to contribute will not lead to reprisals and to leave the rest to the independence and good sense of each individual.[88]

During the floor debate on the 1976 amendments, similar concerns were expressed. In the House, Representative Thompson spoke of "the coercion inherent in the solicitation of employees by employers": [89]

> [W]ith respect to employee coercion, it is simply a fact that solicitations by an employer, no matter for what purpose, and no matter how well-intentioned, are psychologically coercive. The employee is going to be intimidated and coerced, because the entity soliciting the funds is, for all practical purposes, the same as, or closely related to the one which also gives the salary raises and promotions. This fundamental principle was a major reason for the particular balance established by section 610 in 1971, which the SUNPAC advisory opinion so drastically altered in 1975.
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> This bill corrects th[is] Commission-created problem[].[90]

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[88] 117 Cong. Rec. 43381 (1971) (remarks of Representative Hansen) (emphasis added).

[89] 122 Cong. Rec. 8881 (1976) (remarks of Representative Thompson). Since this statement was made in reference to the Commission's *SUNPAC* ruling, which allowed a corporate PAC to solicit all of the corporation's employees, it does not offer substantial support for the proposition that corporate solicitation, even when *confined to executive and administrative employees*, is nevertheless *per se* coercive.

[90] *Id.* (emphasis added).

In the Senate, Senator Bumpers spoke out against the second amendment Senator Packwood offered that would have authorized corporate and labor PACs to solicit non-union, *non-supervisory* employees.[91]

> MR. BUMPERS. The last amendment which was just defeated, I think, troubled most of the Members in this body for a very simple reason: Everybody is concerned about the possibilities of a gentle, nevertheless overt, pressure when employees are solicited by their employer.
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> . . . The thing that troubles me about that is that it occurs to me that the pressure is really more stark in the instance where the employee is not unionized and does not have anyone as a bulwark between him and the employer. He has no organization; he has no one to protect him if he decides to say no to the employer. Does the Senator not see that as a problem?
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> MR. PACKWOOD. It is a problem. It is illegal under existing law to coerce or pressure anyone into making contributions, but the Senator from Arkansas is correct; I will admit it is a problem. . . .
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> MR. BUMPERS. I thank the Senator. That answers my question. I see the Senator is cognizant of the problem. I am not talking about the question of where there is overt pressure to either give or you will not have a job next week, but I think the pressure is there, and that troubles me.[92]

Senator Brock, although he spoke *for* the second Packwood amendment, sounded a similar theme:

> MR. BROCK. Mr. President, I want to be very sure we understand what we are doing here. . . . I would like to be very honest: any of these pacts

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[91] The Senate rejected this amendment. *See* text accompanying notes 34-36 *supra*.

[92] 122 Cong. Rec. 6959-60 (1976).

> [sic], they all bother me. There is implicit in a pact [sic], if not the fact at least the opportunity for pressure. That bothers me greatly. It occurs just as much in a union shop as it does with a corporation soliciting its lower management group, and I think it is something we ought to be troubled about, and we ought to be extremely careful what we do.
>
> I do not know how to resolve that because I do know how to limit voluntary associations for public purposes. I think they are very good, but, boy, it does trouble me to have a law setting these things up with full understanding, in a posture whereby people can be abused, or at least be concerned about being abused. That is the real danger. They do not know what is going to happen. They do not know if they are going to have their union card pulled or if they are going to lose that opportunity for promotion.[93]

These statements, read in isolation, might be thought to reflect an undifferentiated, across-the-board concern about solicitation of all employees, regardless of their place in the employment hierarchy. But read in the context of the entire legislative history, the statements confirm a dominant concern in Congress about the risk of coercion and intimidation of *hourly* employees.[94] The statutory language plainly demonstrates that concern: solicitation of hourly employees is severely restricted; solicitation of career employees is generally permitted, but is brigaded with protections designed to prevent overreaching. We recall here the evil Congress perceived in the *SUNPAC* ruling (allowing corporate PACs to solicit *all* employees)

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[93] *Id.* at 6960 (remarks of Senator Brock).

[94] Representative Thompson believed that the 1976 amendments "corrected" the problem of employee coercion, and spoke in favor of the amendments. *See* text accompanying note 90 *supra*. The statements of Senators Bumpers and Brock concerned the second Packwood amendment, which would have extended corporate solicitation to include non-union, non-supervisory employees.

and the method Congress chose to overrule it (section 441b(b)(4)). In 1971, Congress, in an effort to protect union members and corporate shareholders against arm-twisting solicitation, enacted several safeguards—now codified at section 441b(b)(3)(A)-(C). Congress believed these measures would eliminate, or at least substantially deter, coercive tactics. When Congress extended corporate solicitation to reach executive and administrative personnel in 1976, it extended as well the protections earlier afforded union members and shareholders. There is no indication that Congress believed or had cause to believe its safeguards ineffective in the interim between the enactment of FECA and the 1976 amendments. Nor is there any evident reason to believe that protections Congress relied upon to secure union members against union pressure would be less adequate in securing career employees against corporate pressure.[95]

The judgment of Congress in this domain, as *Letter Carriers* suggests, is entitled to particular respect. *See also CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 102-03 (1973). Congress took into account competing interests "in the context of the political arena where the expertise of legislators is at its peak and that of judges is at its very lowest." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 804 (1978) (White, J., dissenting). The legislative history demonstrates congressional attention to the multi-faceted speech and political participation concerns at stake.[96] Plaintiffs have

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[95] The district court, in its evaluation of plaintiffs' statutory argument, was of a similar mind. *See* Mem. Op., *supra* note 7, at 6, App. 15.

[96] We must count among these concerns the interest of a corporation in communicating with and soliciting its shareholders and employees, an interest emphasized by Congress in the Hansen amendment and explicitly acknowledged as sheltered within the First Amendment by the Supreme Court. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-83 (1978); Buckley v. Valeo, 424 U.S. 1 (1976). *But cf.* California Medical Ass'n v. FEC, 101

offered no convincing argument in support of their plea that we upset the decision Congress made.

Plaintiffs recite a host of cases[97] alleged to stand for the principle that "in areas within the reach of the First Amendment government can neither inhibit individual freedom nor compel activism of the individual."[98] But this is desperate argument. In each of the cases plaintiffs cite, the Court struck down *government requirements* or actions that compelled an individual to speak

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S.Ct. 2712, 2721-22 (1981) (Marshall, J., joined by Brennan, White, and Stevens, JJ.) (trade association's contribution to PAC is speech-by-proxy not entitled to full First Amendment protection).

The ruling plaintiffs seek, that the solicitation at issue *per se* violates the First Amendment rights of career employees, might well *require* Congress to ban all such solicitation. Such a ban, in turn, might invite constitutional challenge at least as plausible as the one presented here.

[97] Branti v. Finkel, 445 U.S. 507 (1980) (patronage dismissal of assistant public defender violates First Amendment); Abood v. Detroit Board of Educ., 431 U.S. 209 (1977) (use of compulsory union dues for political purposes violates First Amendment rights of dissenting employees, *see* text at pages 49-51 *infra*); Wooley v. Maynard, 430 U.S. 750 (1977) (state requirement that vehicle owners display "Live Free or Die" motto on license plates violates First Amendment right to refrain from speaking); Elrod v. Burns, 427 U.S. 347 (1976) (discharge or threat of discharge of public employees because of partisan political affiliation or nonaffiliation violates First Amendment); Sherbert v. Verner, 374 U.S. 398 (1963) (employment compensation cannot be denied an individual who refuses for religious reasons to accept Saturday employment); Torcasco v. Watkins, 367 U.S. 488 (1961) (public office job seeker cannot be required to declare a belief in God); Speiser v. Randall, 357 U.S. 513 (1958) (statute requiring loyalty oath as a condition to receiving property tax exemption violates First Amendment); Wieman v. Updegraff, 344 U.S. 183 (1952) (state employees cannot be required to take a loyalty oath denying affiliation with Communist Party); West Va. Board of Educ. v. Barnette, 319 U.S. 624 (1943) (schoolchildren cannot be compelled to recite pledge of allegiance).

[98] Brief for Plaintiffs at 37.

or associate against personal political or religious beliefs. Here, the *government* neither *requires* career employees to contribute to their PAC against their will nor *requires* corporations to set up a PAC and solicit their career employees; government merely permits such solicitation, and enforces restrictions designed to check attempts to coerce contributions. Whatever the scope of an individual's First Amendment right of political abstention, we hold that the statutory authorization of corporate PAC solicitation of executive and administrative employees does not curtail that right. We thus conclude that the in-person, group, and supervisor solicitation of career employees that the statute allows, subject to controls against abuse, does not unconstitutionally encroach upon individual rights of political association and expression.

C. *Does the use of general corporate assets to establish and support a corporate PAC violate the First Amendment rights of dissenting shareholders?*

The third certified constitutional question also concerns an alleged right of political abstention: Has Congress, by authorizing a corporation to use its assets to finance the administrative costs of its PAC,[99] impermissibly impinged upon the First Amendment rights of shareholders who object to such use of corporate assets? [100] Plaintiffs reason

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[99] Section 441b(b)(2)(C) excludes from the definition of "contribution or expenditure," and thus specifically permits, "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization . . . ." The Supreme Court in *Pipefitters* held expressly that the Hansen amendment "plainly permits" the use of general union monies for the establishment and support of labor union PACs. 407 U.S. at 428-31. *See also Buckley v. Valeo*, 424 U.S. at 28 n.31 ("Corporate and union resources without limitation may be employed to administer these funds and to solicit contributions from employees, stockholders, and union members.").

[100] All four corporations (of the eleven named in plaintiffs' administrative complaint), whose solicitation methods and practices were

that Congress has forced them to forfeit their right to be free of "compulsory political exactions by sanction of law" because FECA permits their corporation to spend money in aid of political action they disapprove.[101]

Again we encounter at the threshold a formidable "governmental (state) action" issue but, for the reasons indicated earlier,[102] we pretermit the question. We reject plaintiffs' third claim because it stretches beyond reasonable proportion the doctrine plaintiffs would press into service.

Plaintiffs rely on *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and *Abood v. Detroit*

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discovered in the district court for the purpose of developing a record for our constitutional adjudication, finance the organization and operating costs of their PACs from general corporate assets. Findings of Fact 185-94, App. 74-76.

Plaintiffs Alan and Anne Morrison jointly own common stock of the Eaton Corporation, whose PAC is operated from general corporate assets. Findings of Fact 187-88, 199, App. 55, 58. Plaintiffs' complaint in the district court included the Morrison's protest that the use of corporate assets to operate Eaton Corporation's PAC constituted "the use of their monies for political purposes which they do not approve." Complaint, ¶ 7, App. 4. The complaint also includes an allegation that IAMA, as an institutional investor, objects to the "coerced political use of corporate assets." Complaint, ¶ 8, App. 4. The district court found that the IAMA Officers and Employees Pension Fund owns stock in three corporations targeted in plaintiffs' administrative complaint: Union Oil Co., Standard Oil of Indiana, and General Motors Corp. Findings of Fact 199, App. 58. The record does not disclose, however, whether these corporations use corporate assets to operate their PACs. (Although we have held that IAMA lacks the requisite standing to serve as a plaintiff in this action, *see* page 10 *supra*, William Winpisinger, as IAMA President, and Eugene Glover, as trustee of the Union's Pension Fund, *see* note 2 *supra*, are individuals eligible to vote in federal elections and thus may raise this issue on behalf of IAMA.)

[101] *See* Reply Brief for Plaintiffs at 10-11; Brief for Plaintiffs at 42.

[102] *See* text at page 37 *supra*.

Board of Education, 431 U.S. 209 (1977), decisions concerning the use of compulsory union dues [103] by a labor PAC to fund and promote the election of certain candidates.

In *Street*, the Court made no constitutional determination. Rather, it construed Section 2, Eleventh of the Railway Labor Act [104] to "deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." 367 U.S. at 768-69.

In *Abood*, the Court held that the First Amendment prohibited a public employee union from requiring any employee "to contribute to the support of an ideological cause he may oppose as a condition of holding a job":

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

431 U.S. at 235-36 (footnote omitted). We acknowledge, as plaintiffs point out, that the *Abood* majority did not

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[103] Under the union-shop agreement the Court held constitutional in Railway Employees' Dep't v. Hanson, 351 U.S. 225, 238 (1956), "an employee must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required." Under an agency-shop agreement, upheld as constitutional in *Abood*, an employee may refuse to join the union, but must as a condition of continued employment pay to the union all fees and dues required of union members. *Abood*, 431 U.S. at 217 n.10.

[104] 45 U.S.C. § 152, Eleventh.

declare a principle applicable only to public employee unions. Rather, the offending "governmental action" stemmed from a state statute that sanctioned the agency-shop agreement, which made the payment of all union fees and dues a condition of job retention. 431 U.S. at 226-27. The Court quoted an earlier opinion:

> [T]he federal statute is the source of the power and authority by which any private rights are lost or sacrificed. . . . *The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates* . . . .

431 U.S. at 218 n.12 (*quoting Railway Employees Department v. Hanson*, 351 U.S. 225, 232 (1956)) (emphasis added).

But plaintiffs reach too far in equating the situation of a worker who is compelled to join a union, or to pay union dues on pain of losing his employment, with that of a shareholder in a publicly-held company whose livelihood does not depend on retaining stock in a corporation involved in political activity he opposes and whose investment is tenuously linked to the establishment and operation of the corporation's PAC. The worker's situation is often instinct with coercion, the shareholder's, at least when the corporation is publicly held, generally will not bear the same characterization. As the Supreme Court noted in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978): "[T]he shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason." 435 U.S. at 794 n.34.[105]

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[105] In *Bellotti*, the Court invalidated on First Amendment grounds a Massachusetts criminal statute prohibiting certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals. In considering justifications Massachusetts urged in support of the suppression of corporate speech, the Court said that the asserted state interest in "protecting the rights of shareholders whose views differ from those expressed

Bellotti further explained the "critical distinction" that leads us to regard plaintiffs' argument as insubstantial:

> In [*Street* and *Abood*] employees were required, either by state law or by agreement between the employer and the union, to pay dues for a "service fee" to the exclusive bargaining representative. To the extent that these funds were used by the union in furtherance of political goals, unrelated to collective bargaining, they were held to be unconstitutional because they compelled the dissenting union member " 'to furnish contributions of money for the propagation of opinions which he disbelieves . . . .' "[]
>
> The critical distinction here is that *no shareholder has been "compelled" to contribute anything*. . . . A more relevant analogy, therefore, is the situation where an employee voluntarily joins a union, or an individual voluntarily joins an association, and later finds himself in disagreement with its stance on a political issue.

435 U.S. at 794-95 n.34 (emphasis added) (citation

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by management on behalf of the corporation" was belied by the under- and over-inclusiveness of the statute. (The Court observed that the state's asserted interests in restricting corporate expression may be "weighty" in the context of partisan candidate elections, where the overriding concern of regulatory laws was "the problem of corruption of elected representatives through the creation of political debts.") 435 U.S. at 787-88 n.26; *id.* at 803, 819-21 (White, J., dissenting).

The question in *Bellotti* was whether a state statute, enacted in part to protect the interests of dissenting shareholders, violated a *corporation's* First Amendment right of political *expression*. Here, plaintiffs present the converse question: whether a statute enacted in recognition of a corporation's right to communicate with its shareholders and career employees (*see* text accompanying notes 68-69 *supra*) violates a dissenting *shareholder's* First Amendment right of political *abstention*.

omitted).[106] Justice Black, writing in dissent in *Street*—he would have found a constitutional violation—similarly identified the infirmity in the reasoning plaintiffs urge upon us:

> There is, of course, no constitutional reason why a union or other private group may not spend its funds for political or ideological causes *if its members voluntarily join it and can voluntarily get out of it. Labor unions made up of voluntary members free to get in or out of the unions when they please* have played important and useful roles in politics and economic affairs. How to spend its money is a ques-

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[106] Justice White disagreed with the majority's assessment; he stated:

> The employees in *Street* and *Abood* were also free to seek other jobs where they would not be compelled to finance causes with which they disagreed, but we held in *Abood* that First Amendment rights could not be so burdened. Clearly the State has a strong interest in assuring that its citizens are not forced to choose between supporting the propagation of views with which they disagree and passing up investment opportunities.

435 U.S. at 818 (White, J., dissenting). It bears emphasis that although Justice White believed "First Amendment concerns of stockholders . . . directly implicated," *id.* at 816, he did not conclude that shareholders could establish a constitutional violation based on their disagreement with the corporation's advertised political positions. *See id.* at 814 ("Presumably, unlike the situations presented by *Street* and *Abood*, the use of funds invested by shareholders with opposing views by Massachusetts corporations in connection with referenda or elections *would not constitute state action* and, consequently, would not violate the First Amendment.") (emphasis added). Rather, he considered "First Amendment concerns" in the context of evaluating the Massachusetts interest in restricting corporate political activity, and concluded that the corporate speech restriction the state imposed was in harmony with the Amendment. Moreover, with all respect, we believe that relinquishing one's job and seeking employment elsewhere is not comparable to passing up opportunities to invest in publicly-held companies. We note that this case does not present any question with respect to a minority owner of shares in a closely-held corporation and we do not address the situation of such a shareholder.

> tion for each voluntary group to decide for itself in the absence of some valid law forbidding activities for which the money is spent. But *a different situation arises when a federal law steps in and authorizes such a group to carry on activities at the expense of persons who do not choose to be members of the group as well as those who do.* Such a law, even though validly passed by Congress, cannot be used in a way that abridges the specifically defined freedoms of the First Amendment.

367 U.S. at 788-89 (Black, J., dissenting) (emphasis added) (footnotes omitted). In sum, the Supreme Court's analyses relevant to plaintiffs' claim point securely to this conclusion: a dissenting shareholder in a publicly-held company who does not allege any legal or practical obligation to continue his investment, is not compelled to speak, in violation of his First Amendment right to remain silent, by a statute authorizing a corporation to use a portion of its assets to establish and maintain the corporation's political action committee. We therefore inquire no further and rule against plaintiffs on their third and final constitutional challenge.

V. Conclusion

For the foregoing reasons, we hold that the 1976 amendments to FECA do not violate the constitutional rights asserted by plaintiffs. Accordingly, we answer in the negative each certified constitutional question.[107]

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[107] *See* note 11 *supra*.

EDWARDS, *Circuit Judge, concurring*: I concur in Parts I, II, III, IV.A. and IV.B. of the court's per curiam opinion. I also concur in the result reached with respect to the question posed in Part IV.C. of the majority opinion.[1] I am, however, troubled by the sharp distinction that the court draws in Part IV.C. between the interests of dissenting union members and those of dissenting corporate stockholders in political abstention. Because the analysis in the majority opinion may be read to suggest that dissenting stockholders have no legitimate interest in the use of their investments for partisan political or ideological purposes, and because in my view the court's conclusion is not compelled by Supreme Court precedent, I write separately to concur on grounds different from those relied upon by the majority. In particular, I would hold that plaintiffs cannot prevail on the political abstention issue due to a lack of "state (governmental) action" in this case.

I.

Plaintiffs contend that, "[i]n approving the use of the general corporate assets for the operating costs of its PAC (2 U.S.C. § 441b(b)(2)(C)), the statute requires stockholders to bear the costs of political operations which frequently do not meet their own political interests and desires. . . . Thus, when Congress approved the use of the stockholders' assets to meet the operating costs of corporate PAC's, it authorized the involuntary use of a citizen's assets for the support of political candidates whom he may not wish to support or may actively oppose." Plaintiffs' brief at 41-42 (footnote omitted).

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[1] Part IV.C. of the court's opinion addresses the third certified question: "Do the provisions of FECA (2 U.S.C. § 441b(a) and § 441b(b)(2)) that authorize the use of general corporate assets to pay the operating costs of a corporation's separate segregated fund that makes contributions to federal candidates violate the First Amendment rights of a stockholder who objects to the use of his corporate assets for political purposes?"

Relying primarily on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), plaintiffs argue that "[e]stablished constitutional principles bar . . . compulsory political exaction under sanction of law." Plaintiffs' brief at 42.

In *Abood*, the State of Michigan had enacted legislation authorizing a system for union representation of local government employees, including a statutory provision allowing for "agency shop" agreements. Under the authorized agency shop agreement, a public employee represented by a union could be required to pay to the union—as a condition of employment—a service fee equal in amount to union dues. The issue before the Court was "whether [the agency shop] arrangement violate[d] the constitutional rights of government employees who object to public-sector unions as such or to various union activities financed by the compulsory service fees." 431 U.S. at 211. The Court held that mandatory agency shop fees could not be spent, *over an employee's objection*, "for the expression of political views, on behalf of political candidates, or towards the advancement of other ideological causes not germane to [a union's] duties as collective-bargaining representative." 431 U.S. at 235 (footnote omitted). In reaching this conclusion, the Court acknowledged that "[t]here will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." 431 U.S. at 236 (footnote omitted).

Although the majority opinion in the instant case recognizes that "union members are to their union as shareholders are to their corporation," majority op. at 32, the court nevertheless finds *Abood* inapposite. According to the majority, corporate stockholders—the legal owners of the corporation—have *less* right to control the political use of their funds than union members. Relying on a

footnote in *First National Bank v. Bellotti*, 435 U.S. 765, 794 n.34 (1978), the court reasons that the political use of a stockholder's share of corporate assets is never coercive because the stockholder has no "legal or practical obligation to continue his investment." Majority op. at 54.[2] In contrast, the majority posits that the dues obligation under a union or agency shop agreement makes "[t]he worker's situation . . . instinct with coercion." *Id.* at 51.

With all due respect, I believe that the distinctions drawn by the majority between union members and stockholders are founded on generalized characterizations lacking any substantial basis in the record before us. One simply cannot conclude that corporate stockholders are never coerced when the money they have invested in the hope of pecuniary return is spent for political purposes. For example, while stockholders often have a ready market for their corporate shares, that may not

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[2] Footnote 34 of *Bellotti*, although informative, is not controlling here. A number of features distinguish this case. First, the case before us concerns partisan candidate elections rather than a referendum proposal or ballot initiative. The Court in *Bellotti* explicitly refrained from considering the First Amendment interests of dissenting stockholders in partisan candidate elections. 435 U.S. at 787-88 & n.26; *see also Citizens Against Rent Control v. City of Berkeley*, 102 S. Ct. 434 (1981). Second, the Court in *Bellotti* principally rejected the state interest in protecting dissenting stockholders because the underinclusiveness and overinclusiveness of the Massachusetts statute belied that purpose. 435 U.S. at 792-95. In this case, however, the dissenting stockholder's interest in political abstention is directly presented. Third, the Court noted the absence of a dissenting stockholder complaining of the corporate expenditures in *Bellotti*. *Id.* at 794 n.34. Those interested plaintiffs are present here. Fourth, in *Bellotti* the proposed remedy for the infringement of the right of political abstention was the total silencing of the majority. *Id.* The plaintiffs here seek only to forbid the corporate finance and operation of PACs; the PACs could conceivably continue as self-sufficient and self-financing entities. These four distinguishing features become all the more important in light of the five to four split in the Supreme Court in *Bellotti*.

be true for the minority owner of shares in a closely held corporation. If such a minority owner's principal source of income is the dividend distributions from his corporate holdings, who is to say that he is not coerced if the corporation establishes and finances a PAC that supports candidates who are antithetical to his political views? How is this minority stockholder different from the union member whose livelihood depends on her job and who complains if her union contributes a portion of her mandatory dues to a political candidate whom she opposes?[3] The majority opinion, in my view, errs when it ignores such situations that run counter to its generalized analysis. As Justice Frankfurter noted: "Generalizations are treacherous in the application of large constitutional concepts." *Hughes v. Superior Court*, 339 U.S. 460, 469 (1950).[4]

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[3] Nor is it possible to conclude by pure deduction that *all* dissident union members necessarily would be coerced if union dues were used for political purposes. For example, a skilled tradesman in a tight job market might have a wide choice of jobs—just as the owner of a publicly traded stock has a wide choice of stocks. The Supreme Court in *Abood*, however, did not distinguish between union members based on their ability to find alternative employment. This suggests that the Court did not believe that the ability to take one's services, or one's savings, elsewhere is an adequate protection for the right of political abstention. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 818 (1978) (White, J., dissenting).

[4] I also believe that the court's analysis ignores, and thereby depreciates, established principles of corporate law. Corporate stockholders are the *legal owners* of their corporation, not merely holders of negotiable debentures. They therefore have legal remedies, such as a derivative suit, for what they perceive as improper acts by those charged with directing and managing the company. *See, e.g., First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795 (1978); *Cort v. Ash*, 422 U.S. 66, 84 (1975). Thus, the court's reasoning that stockholders are not harmed or coerced by political expenditure of corporate assets because they can sell their stock directly contradicts the legal basis of the derivative suit. If taken to its logical extreme, the court's analysis would imply that the derivative suit is unnecessary as long as the negotiability of the stock is not diminished.

II.

While I cannot embrace the rationale in Part IV.C. of the majority opinion, I nevertheless concur in the result. Rather than holding that corporate financing of PACs never coerces dissenting stockholders (and that union support of political causes and candidates always coerces dissenting union members), I would hold that the plaintiffs cannot prevail on the political absention issue for want of "state (governmental) action."[5] *See First National Bank v. Bellotti*, 435 U.S. 765, 814 (1978) (White, J., dissenting).

In finding no governmental action here, I start with certain critical assumptions. First, it is my understanding that, absent some lawfully enacted congressional or state prohibition, a private company may freely expend or contribute corporate funds for partisan political purposes. Second, possibly as a corollary to the first proposition, I assume that the Federal Election Campaign Act (FECA), as a legislative enactment, is not constitutionally compelled. Therefore, although I recognize that FECA regulates the creation of corporate PACs and imposes certain limitations on political contributions, I do not view the Act as *authorizing* activity that would otherwise be unlawful. *See* note 6 *infra*.

Furthermore, I am unwilling to assume that "[c]orporate use of stockholder assets to operate employee PACs *results* from Congressional action." Plaintiffs' brief at 43 n.14 (emphasis added). There is no concrete evidence to support this suggestion and it appears to me to be counter-intuitive. In other words, I assume that it is highly likely that corporate funds would be contributed to political campaigns, at levels at least comparable to present

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[5] My conclusion that there is no "state action" here applies as well with respect to the question posed in Part IV.B. of the majority opinion. I concur in the court's disposition of that question on the merits as an alternative holding.

levels of contribution, absent any legislative regulation or prohibition. I therefore do not view the enactment of FECA, or any like statute, as encouraging corporate political donations.[6]

With these assumptions in mind, I have great difficulty in comprehending how FECA can be perceived as satisfying the "state action" requirement. The corporate political activity in this case—without more—is purely *private action.* Although it is true that the "state action" standard is rarely susceptible to a simple definition, at the least we know that the conversion of private action into governmental action for purposes of constitutional adjudication requires some governmental involvement in, or encouragement of, the private action in question. *See, e.g., Peterson v. City of Greenville*, 373 U.S. 244, 247-48 (1963); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). I can find no such governmental involvement or encouragement in this case.

The fact that a corporation is a legal entity created pursuant to a state's laws does not imbue all of its actions with the state's authority for constitutional purposes. *Cf. Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51 (1974) (action of regulated public utility not state action); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (action of private club granted state liquor license not state action). Nor does mere governmental "acquiescence in a private action convert[] that action into that of the State." *Flagg Brothers v. Brooks*, 436 U.S. 149, 164 (1978). In this case no more than acquiescence is involved. Congress has neither required, encouraged, nor coerced the creation of corporate PACs. Neither has it required corporations to fund the operating expenses of

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[6] Obviously, FECA was a permissive piece of legislation in the sense that it lifted the prior ban against the expenditure of corporate funds in federal election campaigns. This, to me, however, is not the same as *encouraging* (or coercing) action that might not otherwise occur pursuant to voluntary choice.

PACs or to solicit stockholders and executive employees. These corporate actions are entirely voluntary.

It would seem to me that, but for the confused state of the law reflected in the agency and union shop cases,[7] the "state action" question in this case would be relatively simple. The principal source of confusion is the Supreme Court's majority opinion in *Abood*, *supra*. Although *Abood* involved *public* employers and *public* employees, the majority opinion there, relying heavily on *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), assumed that "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." 431 U.S. at 232. The majority opinion in *Abood* also cited Justice Douglas' concurring opinion in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), to show that

> *Hanson* nowhere suggested that the constitutional scrutiny of the agency-shop agreement was watered down because the governmental action operated less directly than is true in a case [involving *public* employers and employees]. Indeed, Mr. Justice Douglas, the author of *Hanson*, expressly repudiated that suggestion:
>
> > "Since neither Congress nor the state legislatures can abridge [First Amendment] rights, they cannot grant the power to private groups to abridge them. As I read the First Amendment, it forbids any abridgement by government whether directly or indirectly." *Street*, 367 U.S., at 777 (concurring opinion).

431 U.S. at 227 n.23.

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[7] *Compare Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971), *with Reid v. McDonnell Douglas Corp.*, 443 F.2d 408 (10th Cir. 1971). *See also Buckley v. American Fed'n of Television & Radio Artists*, 496 F.2d 305, 309-10 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974); *Havas v. Communications Workers of America*, 509 F. Supp. 144 (N.D.N.Y. 1981).

At first blush, it might appear that *Abood* and *Hanson* are dispositive of the "state action" question in this case. Logically extended, the holdings in these two cases seem to support plaintiffs' contention that "[w]hen corporate action is authorized by and derives from Congressional action, constitutional limitations clearly apply." Plaintiffs' brief at 42 n.14. Unfortunately, the issue is not so simple. For one thing, the decision in *Hanson* (which provides the underpinning for the "state action" holdings in *Abood*) is hardly free from ambiguity. For another thing, I do not believe that the alleged governmental action here can be equated with the governmental action found in the agency or union shop cases.

In *Hanson*, a group of railroad employees brought a suit in a Nebraska court to enjoin enforcement of a union shop agreement. The challenged union shop clause was authorized by the Railway Labor Act, 45 U.S.C. § 152, Eleventh. That section of the Railway Labor Act also shielded a union shop clause from the otherwise prohibitory "right to work" provision in the Nebraska Constitution. The Nebraska Supreme Court upheld an injunction against the enforcement of the union shop clause on the grounds that it deprived employees of the right of freedom of association protected by the First Amendment. The Supreme Court agreed that the case presented justiciable questions under the First and Fifth Amendments. However, as was noted in *Abood*, the Court in *Hanson* found that

> the Railway Labor Act pre-empts any attempt by a State to prohibit a union-shop agreement. Had it not been for that federal statute, the union-shop provision at issue in *Hanson* would have been invalidated under Nebraska law. The *Hanson* Court accordingly reasoned that government action was present: "[T]he federal statute is the source of the power and authority by which any private rights are lost or sacrified. . . . The enactment of the

> federal statute authorizing union shop agreements is the governmental action on which the Constitution operates . . . ." 351 U.S., at 232.

431 U.S. at 218 n.12. Unlike the situation in *Hanson*, this case does not involve action authorized by a federal statute that, by its terms, preempts contrary state law. Absent FECA, or some like statute, corporate contributions to federal election campaigns would be plainly lawful.

Additionally, even if *Hanson* cannot be distinguished because, unlike the Railway Labor Act, FECA does not here preempt state law, there is an equally compelling reason to reject a finding of "state action" in this case. In *Hanson*, in finding "state action," the Court obviously was persuaded that precedents such as *Shelley v. Kraemer*, 334 U.S. 1 (1948), were controlling. Thus, the opinion in *Hanson* stresses that,

> [i]f private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed.

351 U.S. at 232. The Court then added that, *in this context*, "[o]nce courts enforce the agreement the sanction of government is, of course, put behind them." *Id.* at n.4.

The instant case, however, in no way resembles the circumstances presented in *Hanson*. Here, plaintiffs have lost no rights by virtue of federal law.[8] Moreover, unlike

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[8] With respect to the issue being considered here, FECA, realistically considered, limits (or at least regulates) the rights of corporations to make political contributions in federal elections. The Act was not designed to limit the plaintiffs' rights of political expression, except insofar as plaintiffs are restricted as the legal

Hanson and *Shelley*, there is no issue here involving the "sanction of government" attributable to judicial enforcement of constitutionally suspect private agreements.

Admittedly, the "state action" question is not an easy one, and no answer is free from doubt. Nevertheless, on the facts of this case, I simply cannot find the requisite governmental action to warrant a consideration of plaintiffs' constitutional claims with respect to political abstention. On this basis, I concur.

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owners of regulated corporations. As noted above, absent FECA, or some like statute, corporate contributions to federal election campaigns would be both lawful and unregulated.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0354

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants.

[Filed June 3, 1981]

CERTIFICATION

Pursuant to 2 U.S.C. § 437h(a), the Court hereby certifies the accompanying Findings of Fact and Constitutional Questions to the United States Court of Appeals for the District of Columbia Circuit.

Entered: June 3rd, 1981

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United State District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0354

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants.

[Filed June 3, 1981]

FINDINGS OF FACT AND CONSTITUTIONAL QUESTIONS FOR CERTIFICATION UNDER 2 U.S.C. § 437(h)

This is a proceeding brought under 2 U.S.C. § 437h by six individuals and by the International Association of Machinists ("IAM") to determine the constitutionality of certain provisions of the Federal Election Campaign Act ("FECA"). Section 437h provides that:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

In addition to certifying constitutional questions, District Courts in such cases transmit a record to the Court

of Appeals. A record has been prepared by the parties in the form of an Agreement by the Parties with attached exhibits, which provides the basis for appropriate findings by this Court.

PROCEDURAL BACKGROUND

This action was filed on February 4, 1980 by the International Association of Machinists, a national labor organization; William W. Winpisinger, President of the International Association of Machinists; Judy Reardon, Rebecca Ward, Anne S. Morrison, Alan S. Morrison and Eugene Glover. In addition to their status as eligible voters, the individual plaintiffs asserted a variety of other interests in the constitutional issues presented for resolution. Defendants are the Federal Election Commission and its Chairman.

Prior to filing this action, on October 9, 1979 plaintiffs filed a sworn complaint with the Federal Election Commission pursuant to 2 U.S.C. § 437g(a)(1). In their administrative complaint plaintiffs presented certain information concerning the operations of the Political Action Committees (PACs) of eleven national corporations, and asserted that the methods by which these corporations solicit donations to their PACs from executive and administrative employees violate 2 U.S.C. § 441(b)(3), which *inter alia*, prohibits coercive solicitations. Plaintiffs further asserted that if FECA is not construed to bar the solicitation practices of the corporations as alleged, then the statute violates the Constitution of the United States. On December 7, 1979, a report to the FEC from its General Counsel reviewed plaintiffs' administrative complaint and concluded that the conduct of the corporations which plaintiffs challenged was not unlawful under FECA and that the complaint did not allege facts which gave "reason to believe" that the challenged conduct of the corporations violated FECA. On December 14, 1979, the Commission voted to dismiss

plaintiffs' sworn complaint, and on February 4, 1980, plaintiffs filed this suit.

Plaintiffs' first cause of action in the suit was not a Constitutional challenge under 2 U.S.C. § 437h, but a claim under 2 U.S.C. § 437g(a)(8) that asserts that their administrative complaint against the eleven corporations set forth conduct forbidden by FECA which required full investigation and appropriate action by the Commission. Plaintiffs' second cause of action asserted that if the statute was construed so that the corporate conduct challenged in the first cause of action is not prohibited, then FECA violates the First Amendment rights of corporate employees. Plaintiffs' third cause of action concerns provisions of the statute that forbid both corporate and union contributions to federal candidates but which permit corporations to make contributions from a separate segregated fund (a PAC) that receives donations from stockholders and administrative and executive employees, and which permit unions to make contributions from a PAC which receives contributions from union members. Plaintiffs contended that such provisions discriminate against unions, asserting that unions do not have sources of PAC funds comparable to those of corporations. Plaintiffs' fourth cause of action asserted that the statute violates the First Amendment rights of corporate stockholders, by authorizing the use of their corporate assets to finance the administrative costs of Political Action Committees which may donate to candidates to whom the stockholder may be opposed.

In 1980, this court considered cross motions for summary judgment on the first cause of action and the defendants' motion to dismiss the second, third and fourth causes of action for lack of subject matter jurisdiction and failure to state a claim. On December 18, 1980, this Court issued an opinion which granted summary judgment against plaintiffs on their first cause of action upon finding that the Commission's dismissal of plain-

tiffs' administrative complaint was not arbitrary or capricious or contrary to law. Plaintiffs have appealed that ruling to the Court of Appeals.

As concerns the constitutional issues, this Court's December 18, 1980 ruling denied defendants' motion to dismiss on standing and other grounds, and held that the constitutional issues posed by plaintiffs are sufficiently substantial to require certification and resolution by the *en banc* Court of Appeals. The parties having agreed that discovery was required for preparation of a record to be transmitted to the Court of Appeals, a consent order concerning discovery was entered by this Court on January 8, 1981. The subsequent inquiries by plaintiffs focused upon four of the corporations named in their prior administrative complaint—Dart Corporation, Eaton Corporation, United Technologies Corporation, and Winn-Dixie Corporation (hereinafter identified as "the corporations"). The materials disclosed by an informal and expedited discovery procedure to which the corporations consented were incorporated in an Agreement by the Parties of April 27, 1981 (attached hereto). The same Agreement incorporated additional facts elicited by defendants concerning the PAC operations of the International Association of Machinists. Finally, the Agreement included considerable other material, mostly from public records, bearing on the constitutional issues presented. All of these materials are contained in the record of exhibits. The agreements of the parties concerning the record and the findings to be entered are without prejudice to each party's right hereafter to contest the relevancy of any fact or finding.

CERTIFIED CONSTITUTIONAL QUESTIONS

Plaintiffs in their complaint assert that if the Federal Elections Campaign Act does not make unlawful the corporate PAC solicitations objected to in the First Cause of Action, then the Act violates the First Amendment

rights of the solicited employees. The Court having previously determined that the FECA authorizes the corporate PAC solicitations objected to in plaintiffs' First Cause of Action, the Court certifies to the Court of Appeals the following questions:

1. Do the provisions of the FECA (2 U.S.C. § 441b(a) and § 441b(b)(2)) which ban corporate contributions to federal elections but which authorize corporate solicitation of executive and administrative employees for donations to a "separate segregated fund" which the corporation may use to contribute to federal elections, violate the rights of such employees under the First Amendment to the Constitution of the United States?

2. Do the provisions of FECA (2 U.S.C. § 441b(a) and § 441b(b)(2)) which bar corporate and union contributions in connection with federal elections but allow a corporation to make contributions through its separate segregated fund with money solicited from its stockholders and its executive and administrative personnel, and a labor union to make contributions through its separate segregated fund with money solicited from its members, create an unconstitutional imbalance between corporations and labor unions in violation of the rights of labor unions and their members as protected by the First and Fifth Amendments?

3. Do the provisions of FECA (2 U.S.C. § 441b(a) and § 441b(b)(2)) that authorize the use of general corporate assets to pay the operating costs of a corporation's separate segregated fund that makes contributions to federal candidates violate the First Amendment rights of a stockholder who objects to the use of his corporate assets for political purposes?

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1664 (En Banc)

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given the International Association of Machinists and Aerospace Workers, *et al.*, the above-named plaintiffs, hereby appeal to the Supreme Court of the United States from the decision of the United States Court of Appeals for the District of Columbia Circuit.

This appeal is taken pursuant to 2 U.S.C. § 437h(b).

Respectfully submitted,

/s/ John Silard
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appeal to the Supreme Court of the United States were served this 21st day of April, 1982, by first-class mail, postage prepaid, upon:

Charles N. Steele, Esquire
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

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Washington, D.C. 20530

/s/ James C. Turner
JAMES C. TURNER

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech . . . ."

B. United States Constitution, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

C. Title 2, United States Code:

§ 437h. Judicial review—Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc

(a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality, of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

Appeal to Supreme Court; time for appeal

(b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

Advancement on appellate docket and expedited disposition of certified questions

(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to

advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

* * * *

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals,

or the threat of force, job discrimination, or financial reprisal, or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4)(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund estab-

lished by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such

member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

FILED
OCT 18 1982

No. 82-326

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE FEDERAL ELECTION COMMISSION TO AFFIRM

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OCTOBER 18, 1982

QUESTION PRESENTED

1. Whether this Court should summarily affirm the unanimous *en banc* decision of the court of appeals that Congress's decision not to prohibit totally corporate solicitation of executive and administrative personnel is consistent with the First and Fifth Amendments to the United States Constitution.*

*The other parties to this proceeding include William W. Winpisinger, Judy Reardon, Rebecca J. Ward, Anne S. Morrison, Alan B. Morrison and Eugene Glover. Also named as a defendant was Robert O. Tiernan, Chairman of the Federal Election Commission. Mr. Tiernan is no longer a Commission member; currently Mr. Frank P. Reiche is the Commission Chairman.

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No. 82-284

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE FEDERAL ELECTION COMMISSION TO AFFIRM

Appellee Federal Election Commission ("the Commission" or "FEC") moves to affirm the decision of the court of appeals *en banc* on the grounds that the questions presented were correctly decided by the court below and do not warrant further review.

OPINIONS BELOW

The unanimous *en banc* decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 678 F.2d 1092 (D.C. Cir. 1982) and appears

in the appendix to appellants' Jurisdictional Statement ("J.S. App.") at 1a. The opinion of the United States District Court for the District of Columbia is reported at 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9144 at 51,104. The June 3, 1981, order of the district court certifying constitutional questions to the court of appeals is not published and appears at J.S. App. 64a.

STATUTES INVOLVED

The relevant statutory provisions are set out at J.S. App. 73a-77a.

STATEMENT OF THE CASE

The procedural history of this case is set forth in Section A below. Section B outlines the development of the statutory exceptions which appellants challenge as unconstitutional.

A. Procedural History of the Case

On October 9, 1979, the International Association of Machinists and Aerospace Workers ("IAM") and the six individual appellants filed an administrative complaint with the Commission naming eleven corporations and their political action committees as respondents. The complaint alleged that solicitations of executive and administrative personnel by the named corporations for contributions to their separate segregated funds were coercive and violated 2 U.S.C. § 441b(b)(3)(A). On December 13, 1979, the Commission unanimously determined that there was no reason to believe that respondents had violated portions of the Federal Election Campaign Act, 2 U.S.C. §§ 431, *et seq.* ("FECA"

or "the Act")[1] and, accordingly, dismissed the IAM complaint.

On February 4, 1980, IAM filed a complaint in district court seeking declaratory and injunctive relief against the Commission and alleging four causes of action. The first cause of action sought a declaration under 2 U.S.C. § 437g(a)(8) that the Commission's dismissal of the administrative complaint filed by IAM was contrary to law. In the event that the relief requested in plaintiffs' first cause of action was denied, IAM's second, third and fourth causes of action sought certification to the court of appeals, pursuant to 2 U.S.C. § 437h(a), of three constitutional questions regarding the validity of portions of the Act.

Appellants alleged in these last three causes of action that 2 U.S.C. § 441b(a) and § 441b(b)(2) were unconstitutional on first and fifth amendment grounds. Each of their constitutional claims is based upon alleged harm flowing from Congress's failure to prohibit corporate solicitation of executive and administrative personnel. No executive and administrative employees were plaintiffs to the action. The second cause of action alleged that the provision of FECA which permits corporations to solicit executive and administrative personnel for contributions to a separate segregated fund infringes upon the first amendment rights of executive and

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[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655, and by the Federal Election Campaign Act Amendments of 1979, Pub., L. No. 96-187, 93 Stat. 1339.

administrative personnel. The third cause alleged that this provision creates an unconstitutional imbalance between the ability of corporations and labor organizations to raise money for political purposes, in violation of the first and fifth amendment rights of labor organizations and their members. The final cause of action alleged that this provision infringes the first amendment rights of any corporate stockholders who might disagree with the corporation's political activities.

On December 16, 1980, the district court granted summary judgment to the Commission on IAM's first cause of action,[2] finding that the Commission's dismissal of appellants' administrative complaint was proper. The court then turned to IAM's constitutional challenge, rejected the Commission's contention that appellants lack standing to raise their challenge, and ordered the preparation of constitutional questions and findings of fact. On June 3, 1981, the district court certified the three constitutional questions to the *en banc* court of appeals.

On April 6, 1982, a unanimous court of appeals *en banc* upheld the constitutionality of the challenged provisions, answering all three certified questions in the

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[2] Thus, in the court of appeals, appellants' original complaint became two cases—one was the review of the Commission's dismissal of the administrative complaint and the other was this case certified pursuant to 2 U.S.C. § 437h. On October 26, 1981, the *en banc* court of appeals unanimously affirmed the dismissal of IAM's administrative complaint by the Commission. *IAM v. FEC*, 672 F.2d 894 (D.C. Cir. 1981) (en banc). On March 11, 1982, IAM filed a petition for a *writ of certiorari* requesting this Court to decide that the solicitation methods and practices of various corporations were coercive and thus violated 2 U.S.C. § 441b(b)(2)(A). On May 17, 1982, this Court entered an order denying the petition. *IAM v. FEC*, ___ U.S. ___, 102 S. Ct. 2237 (May 17, 1982).

negative. In rejecting IAM's constitutional challenges, the court found that FECA, as amended in 1976, does not create an unconstitutional imbalance between corporations and labor organizations; concluded that corporate solicitation of executive and administrative personnel does not unconstitutionally infringe upon the first amendment rights of these employees; and held that use of corporate assets to support the costs of administering a separate segregated fund does not violate the first amendment rights of stockholders.

B. Historical Development of the Provision Permitting Corporate Solicitation of Executive and Administrative Personnel

Congress's decision not to prohibit totally corporate solicitation of executive and administrative personnel evolved during the history of the statute and demonstrates congressional concern that contributions to separate segregated funds be voluntary. In 1971, Congress reenacted the overall prohibition against corporate and labor organization contributions in connection with federal elections.[3] In addition, the 1972 amendments con-

[3] Concern over aggregations of corporate wealth being used to influence federal elections led to congressional passage in 1907 of the first statutory prohibition of corporate political contributions, in the Tillman Act, Chapter 420, 34 Stat. 864 (1907). In 1925, the Tillman Act was expanded and incorporated into the Federal Corrupt Practices Act, 43 Stat. 1070. The prohibition on political contributions was extended to labor organizations, first temporarily by the War Labor Disputes Act, 57 Stat. 163, in 1943, and then permanently by the Labor Management Relations Act (Taft-Hartley) of 1947, 61 Stat. 159, which also broadened the prohibition to include expenditures as well as contributions. In 1948, the prohibition was re-enacted, without substantive change, as 18 U.S.C. § 610. The evolution of the predecessor of 2 U.S.C. § 441b,

tained three express exceptions to the overall prohibition, currently codified at 2 U.S.C. § 441b(b)(2)(A)-(C), which provide several additional avenues for the participation of these groups in the election process. One of these exceptions provides that a corporation or labor organization may use treasury funds for the establishment, administration, and solicitation of voluntary contributions to a separate segregated fund for political purposes. 2 U.S.C. § 441b(b)(2)(C). It is this provision which is at issue in this case.

Congressman Hansen, sponsor of the amendment which became Section 441b(b)(2)(C), explained its purposes as follows:

> It spells out more clearly the rules governing election activities that apply equally to labor unions and corporations. While prohibiting abuses that involve activities directed at the general public, the amendment recognizes that the constitutional guarantee of free speech protects the right of labor organizations and corporations to communicate with their own members or stockholders.

117 Cong. Rec. 43,379 (1971) (remarks of Rep. Hansen). As this Court has observed, the 1971 legislative history of FECA establishes that the limited exceptions to § 441b were the result of Congress's careful balancing of competing interests:

> At the present time there is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a

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18 U.S.C. § 610, through the 1971 legislation, is fully set forth in *Pipefitters v. United States*, 407 U.S. 385 (1972); *United States v. UAW*, 352 U.S. 567 (1957); and *United States v. CIO*, 335 U.S. 106 (1948).

> strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject, to attempt to convince members and stockholders to register and vote, and to make political contributions and expenditures financed by voluntary donations which have been kept in a separate segregated fund. This amendment writes that balance into the clear and unequivocal statutory language.

Pipefitters v. United States, 407 U.S. at 431, *quoting* 117 Cong. Rec. 43, 381 (1971).

In 1976, Congress reaffirmed the long-standing prohibition on the use of corporate treasury funds in connection with federal elections, retained the exception permitting corporations and labor organizations to solicit those individuals discussed in *Pipefitters* (corporate stockholders and union members), and added a corporation's own executive and administrative personnel and their families to the list of permissible solicitees, concluding that these management personnel were "roughly comparable" to stockholders of the corporation.[4] This

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[4] In its report to accompany H.R. 12406, the Committee on House Administration stated:

> [T]he bill broadens the permission contained in the present law to allow corporations to communicate with and solicit voluntary contributions from "executive officers." The Committee believes that management personnel as well as stockholders should be considered to be among the beneficial owners of a corporation ... H.R. 12406 continues the rule that unions may only solicit those they represent—their members—and reaffirms the intent of the 1971 Congress that corporations must also confine their activities to a roughly comparable group—namely, stockholders and executive officers.

H.R. Rep. No. 917, 94th Cong., 2d Sess. 7 (1976).

amendment was in response to an Advisory Opinion ("AO") the Commission had issued to SunPAC, AO 1975-23, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5151 (1975), which concluded that corporations could solicit all employees. During the debate on the 1976 Amendments, and in light of SunPAC, Congress gave extensive and serious consideration to the question of the appropriate limitations on solicitation by corporations and labor organizations for contributions to their separate segregated funds. Congress rejected the Commission's interpretation and, instead, amended the statute to permit unlimited corporate solicitation only of executive and administrative employees. Congress also provided that under certain circumstances a corporation could solicit contributions no more than twice yearly from any of its other employees, and any labor organization representing employees of the corporation could solicit no more than twice yearly from all stockholders, and executive and administrative employees and their families. 2 U.S.C. § 441b(b)(4)(B).

In both 1971 and 1976 Congress also added provisions to the Act designed to minimize the possibility of coercive solicitation of contributions to a separate segregated fund. Representative Hansen, the author of the 1971 exception, explained how Congress acted on these concerns:

> The essential prerequisite for the validity of such political funds is that the contributions to them be voluntary. For that reason the final section of this amendment makes it a violation of section 610 to use physical force, job discrimination, financial reprisals or the threat thereof, in seeking contributions. This is intended to insure that a solicitor for

> COPE or BIPAC cannot abuse his organizational authority in seeking political contributions. Of course, nothing can completely erase some residual effects on this score, any more than the law can control the mental reaction of a businessman asked for a contribution by an individual who happens to be his banker, or a farmer approached by the head of his local farm organization. The proper approach, and the one adopted here, is to provide the strong assurance that a refusal to contribute will not lead to reprisals and to leave the rest to the independence and good sense of each individual.

117 Cong. Rec. H11478 (daily ed. Nov. 30, 1971) (remarks of Rep. Hansen). *See also* 117 Cong. Rec. H11482 (daily ed. Nov. 30, 1971) (remarks of Rep. Thompson). Thus, Congress enacted the provision permitting the establishment of separate segregated funds with the following condition:

> That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, financial reprisal or by dues, fees, or other monies required as a condition of employment, or by monies obtained in any commercial transaction.

18 U.S.C. § 610 as amended by section 205 of FECA of 1971.

In 1976, the Congress expanded the statute's protection against coercive solicitation of employees by their employer or labor organization. Two additional measures were enacted to protect against coercion: a requirement that all solicited employees must be informed at the time of the solicitation of the political purposes of the solicitation, currently 2 U.S.C.

§ 441b(b)(3)(B); and a requirement that all solicited employees must be informed at the time of the solicitation of their right to refuse to contribute without reprisal, currently 2 U.S.C. § 441b(b)(3)(C).

ARGUMENT

THIS COURT SHOULD SUMMARILY AFFIRM THE DECISION BELOW BECAUSE THE QUESTIONS CERTIFIED WERE DECIDED PROPERLY BY THE UNANIMOUS *EN BANC* COURT OF APPEALS

Although phrased in terms of three causes of action, each of which resulted in a certified question to the court of appeals, discussed *infra* at 14–21, there is in reality only one issue presented to this Court for review: appellants' essential argument that the Constitution requires Congress to prohibit employer solicitation of executive and administrative employees. For appellants' contention that the specific provisions enacted by Congress to protect against coerced contribution are insufficient rests on the premise that the very nature of the employment relationship makes such contributions involuntary.[5]

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[5] The Commission maintains, as it did below, that appellants have not made a threshold showing of a distinct and palpable injury of a level sufficient to satisfy the standing requirements of Article III, Sec. 2 of the Constitution. Appellants claim to assert the interests of solicited corporate employees, unions and their members, and corporate stockholders of corporations administering separate segregated funds. Each of these causes of action purports to assert a separate harm, yet each is, at bottom, another assertion that corporate executive and administrative personnel are coercively and thus unconstitutionally solicited, if solicited at all. However none of the plaintiffs in this action are corporate execu-

Contrary to the impression given by their Jurisdictional Statement, J.S. 16–18, appellants here have not challenged the long-standing prohibition on corporate and labor organization contributions and expenditures in connection with federal elections,[6] 2 U.S.C.

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tive or administrative employees, and plaintiffs have been unable to point to a single executive or administrative employee who has ever claimed to have been subjected to coercion, or to have contributed to a separate segregated fund because of coercion. Thus, appellants lack standing to challenge the constitutionality of the Act for assertedly failing to protect adequately executive and administrative personnel not before the Court from coercive solicitation. *Singleton v. Wolfe*, 428 U.S. 106, 114-16 (1976); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Craig v. Boren*, 429 U.S. 190, 192-97 (1976); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, ___ U.S. ___, 102 S. Ct. 752 (January 12, 1982).

[6] Indeed, in *Athens Lumber Co. v. FEC*, 531 F. Supp. 756 (M.D. Ga. 1982), *appeal docketed*, No. 82-8102 (11th Cir. March 1, 1982) (action challenging the § 441b general prohibition), the IAM unsuccessfully sought to intervene on the side of the Commission to defend the constitutionality of the statute's prohibition of contributions and expenditures by corporations and labor organizations in connection with any federal election.

§ 441b.[7] Rather, they allege that the statutory prohibition should be extended further.[8]

Appellants' challenge is supported only by their assumption that solicitation of executive and administrative employees results in involuntary contributions to a separate segregated fund. Yet the Act explicitly prohibits both the use and the threat of employment-related coercion in the solicitation of contributions to

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[7] There is no conflict among the circuits as to the constitutionality of 2 U.S.C. § 441b(a). Numerous federal courts have held the prohibition of union and corporate contributions and expenditures constitutional in the context of specific cases. *California Medical Association v. FEC*, 641 F.2d 619 (9th Cir. 1980) (en banc), *aff'd*, 453 U.S. 182 (1981); *Bread Political Action Committee v. FEC*, 635 F.2d 621 (7th Cir. 1980) (en banc), *rev'd on other grounds*, ___ U.S. ___, 102 S. Ct. 1235 (March 8, 1982); *FEC v. Lance*, 635 F.2d 1132 (5th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 101 S. Ct. 3151 (July 2, 1981); *United States v. Chestnut*, 533 F.2d 40, 51 n.12 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *United States v. Boyle*, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973); *United States v. Pipefitters Local Union No. 562*, 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, *rev'd on other grounds*, 407 U.S. 385 (1972); *FEC v. National Educational Association*, 457 F. Supp. 1102 (D.D.C. 1978); *FEC v. Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978); *United States v. Clifford*, 409 F. Supp. 1070, 1072 (E.D.N.Y. 1976); *Schwartz v. Romnes*, 357 F. Supp. 30 (S.D.N.Y. 1973), *rev'd on other grounds*, 495 F.2d 844 (2d Cir. 1974); *United States v. Brewers' Association*, 239 F. 163 (W.D. Pa. 1916).

[8] Appellants argue to this Court that strict scrutiny must be applied in this case because they contend it would be the appropriate standard of review if the overall prohibition were challenged. J.S. 16–17. This contention is erroneous. The lower court properly rejected this argument, because it is not the constitutionality of the underlying prohibition which is at issue, but rather whether it was unconstitutional for Congress to decline to prohibit corporate solicitation of executive and administrative personnel for contributions to the corporation's separate segregated fund. Congress's decision not to prohibit this solicitation is not a restriction on activity protected by the first amendment.

separate segregated funds maintained both by labor organizations and corporations, 2 U.S.C. § 441b(b). While their Jurisdictional Statement (J.S.7–13), reviews certain solicitation methods contended to be coercive, the question of whether appellants presented sufficient evidence that these corporations engaged in coercive practices prohibited by the statute is not the issue in this case. For as noted above, this Court declined to review the court of appeals' decision affirming the Commission's dismissal of appellants' administrative complaint which alleged that the particular corporations had engaged in coercive practices. *See* n. 2, *supra*.[9] The question before this Court is whether or not the court of appeals correctly concluded that the Constitution does not require Congress to prohibit such solicitation entirely. The answer to each certified question, as set forth below, is that there is no evidence that Congress's decision to prohibit coercive solicitations is insufficient to protect the first and fifth amendment rights of appellants, or the first amendment rights of corporate executive and administrative personnel not before this Court.[10]

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[9] Under 2 U.S.C. § 437h, appellants may only challenge "the constitutionality of any provisions" of FECA. Appellants' challenge to the propriety of specific corporate solicitation methods, *see* J.S. 7-10, must be construed as a challenge to the FECA as applied. Insofar as appellants' challenge attacks the application of FECA and does not present a challenge to a provision of FECA on its face, § 437h does not afford this Court jurisdiction.

[10] Appellants urge this Court to hear the instant case because it enjoys a certain "symmetry" with a case currently before this Court, *FEC v. National Right to Work Committee*, 665 F.2d 731 (D.C.Cir. 1981), *cert. granted*, No. 81-1506 (April 5, 1982). J.S. 20-23. Wholly unlike the present appeal, *FEC v. NRWC* involves the question of whether, contrary to the Act's limitations, a corpo-

A. The Court of Appeals Correctly Held That 2 U.S.C. § 441b(a) and § 441b(b)(2) Do Not Deny Union Appellants Equal Protection of the Law Under the Fifth Amendment.

The court below correctly held that Congress's decision in 1976 to allow corporate solicitation of voluntary contributions from executive and administrative personnel does not deny equal protection of the law to unions or their members under the fifth amendment. The court of appeals noted that "the difference in organizational structures [between corporations and labor unions] allows Congress to shape the election laws to reflect those differences," J.S. App. 32a, and concluded that:

> Congress, in 1971 and 1976, attempted to treat corporations and labor unions in a relatively comparable manner. We hold that the 1976 amendments the plaintiffs challenge are substantially related to this important objective, and therefore do not deprive plaintiffs of equal protection.

J.S. App. 34a.

This Court affirmed the conclusion of another court that the provisions of § 441b limiting the activities of corporations and labor organization "are evenhanded and entirely neutral on their face." *Republican National Committee* v. *FEC*, 487 F. Supp. 280, 288 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S.

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ration without capital stock may solicit anyone *outside* the corporation who it considers to have evidenced a "similar political philosophy." That case has nothing to do with the issue presented here regarding *internal* corporate solicitation, expressly permitted by the statute. Thus, the Commission disagrees that the two cases are related, and submits that there is no reason for them to be heard together.

955 (1980). "Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." *Buckley* v. *Valeo*, 424 U.S. 1, 32 (1976).

As this Court recognized in *California Medical Association* v. *FEC*, 453 U.S. at 201:

> The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process.

Likewise, the United States Court of Appeals for the Seventh Circuit upheld the distinction made in 2 U.S.C. § 441b(b)(4)(D) between corporations, labor organizations and trade associations against an equal protection challenge under the fifth amendment due process clause. *Bread Political Action Committee* v. *FEC*, *supra*. The Seventh Circuit found that any dissimilar treatment:

> follows from the rather obvious fact that each of the different groups has a different kind of constituency and that each require somewhat different regulation to curb abuses the Act was intended to halt. Regulatory distinctions and exceptions tailored to serve a substantial governmental interest, as here, do not violate the fifth amendment's equal protection provision. *See Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 98-99, 99 S.Ct. 2286, 2291, 33 L.Ed. 212.

635 F.2d at 630. Thus, the decision of the *en banc* court of appeals in the instant case that the regulation of these different types of organizations need not be identical is entirely consistent with the decisions of this Court and other courts of appeals.

The court properly found that any attempt to equalize the speech of corporate and labor organization separate segregated funds would directly conflict with previous decisions of this Court. *Id. See Buckley* v. *Valeo*, 424 U.S. at 48-49 ("[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"), *quoted in Citizens Against Rent Control* v. *City of Berkeley*, ___ U.S. ___, 102 S.Ct. 434, 437 (1981). Moreover, in rejecting appellants' argument that 2 U.S.C. § 441b(a) and § 441b(b)(2) create an unconstitutional economic imbalance between corporations and labor unions, the *en banc* court observed that the evidence presented by appellants that the 1976 amendments had created an imbalance between the ability of corporations and labor organizations to accumulate money in their separate segregated funds was, at best, equivocal. J.S. App. 24a n. 49. The court also recognized that "[i]t is unlikely that Congress will ever be able to achieve a perfect balance between the relative influence of corporations and labor unions in federal elections." J.S. App. 34a.

Consistent with well established precedent as articulated by this Court and lower federal courts, the court of appeals properly answered in the negative the second question certified by the district court. This Court should summarily affirm the decision of the court of appeals.

B. 2 U.S.C. § 441b(a) and § 441b(b)(2) Do Not Infringe the First Amendment Rights of Any of the Appellants.

The court of appeals also correctly held that "the in-person, group and supervisor solicitations of career employees that the statute allows, subject to control against abuse, does not unconstitutionally encroach upon individual rights of political association and expression." J.S. App. 47a. As the court noted, appellants failed to produce any evidence in the record to support their argument that *any* corporate solicitation of executive and administrative personnel whatsoever is inherently coercive. "On the record before us," the court stated, "it suffices to say that the proof plaintiffs offer falls woefully short." *Id.* at 39a. The court rejected as "misleading," J.S. App. 38a n.82, appellants' attempts to show that corporate solicitation of executive and administrative personnel is inherently coercive through the use of various charts and statistics. Indeed, as the *en banc* court noted, the contribution rate of the named corporations' executive and administrative personnel disclosed by the record was comparable to the rate of contributions to the CIO separate segregated fund (800,000 out five million members, or 16%) which this Court found in *Pipefitters* v. *United States*, 407 U.S. at 418 n.30, demonstrated the voluntariness of the contributions. Certainly, a review of the unanimous *en banc* court's factual determinations from the evidentiary record does not merit this Court's plenary review.

Moreover, Congress has repeatedly fine-tuned this statute in an effort to minimize the possibility of such coercion. *See supra* at 5–10. The court below

properly recognized that "[t]he judgment of Congress in this domain, as [*United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973)] suggests, is entitled to particular respect," and found that the "legislative history demonstrates congressional attention to the multi-faceted speech and political participation concerns at stake." J.S. App. 45a. The court concluded:

> On the record before us, and in view of the safeguards against coercion with which Congress has brigaded corporate PAC solicitation, we cannot conclude that such solicitation inevitably forces career employees to compromise their political beliefs in order to avoid jeopardizing their corporate positions.

J.S. App. 36a-37a (footnotes omitted).

Appellants maintain that the matter they wish this Court to review is "the *tainted solicitation methods* used by ... corporations." J.S. 18. However, as discussed above, *supra* at 13, this argument is not properly before the Court in this case, because it was resolved by this Court's denial of *certiorari* in the earlier case. Appellants have presented no new argument here which would warrant reconsideration of that decision. Thus, this Court should affirm the decision of the *en banc* court below.

C. Corporate Payment of the Costs of Administering a Separate Segregated Fund Does Not Violate the First Amendment Rights of Stockholders.

The court of appeals also properly answered the third certified question in the negative. Citing *International Association of Machinists* v. *Street*, 367 U.S. 740

(1961) and *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), appellants claimed that stockholders have a right not to have corporate funds spent for political purposes. The court below dismissed appellants' argument, relying upon this Court's decision in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978) to explain the "'critical distinction'" between those two cases and the instant case.[11] In *Bellotti*, this Court stated that "the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason." 435 U.S. at 788 n.34.[12] This Court then distinguished *Street* and *Abood* by noting:

> The critical distinction here is that no shareholder has been "compelled" to contribute anything.... A more relevant analogy, therefore, is the situation where an employee voluntarily joins a union, or an individual voluntarily joins an association, and later finds himself in disagreement with its stance on a political issue.

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[11] Judge Edwards would have rejected this challenge on "state action" grounds. J.S. App. 54a.

[12] Appellants argue, for the first time, that because of such considerations as the "prudent investment rule of ERISA" certain objecting stockholders may not be able to freely transfer their holdings. J.S. 22. Since this argument was not raised in the court of appeals, it cannot be raised in this Court. *Rogers v. Herman Lodge*, ___ U.S. ___, 102 S. Ct. 3272, 3281 (July 1, 1982), *citing Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, there is no indication from the record that any of these plaintiffs have in the past or will in the future invest in such a corporation, nor any indication that any such corporate separate segregated funds may support candidates whose interests conflict with those of union members. Additionally, the IAM fund is under no obligation under this statute to invest in corporations whose political committees support interests contrary to those of the IAM membership, and they cite no authority for their assertion that another statute might require them to do so.

435 U.S. at 794-95 n.34. Following this Court's opinion in *Bellotti*, the court of appeals found that:

> a dissenting shareholder in a publicly held company who does not allege any legal or practical obligation to continue his investment, is not compelled to speak, in violation of his First Amendment right to remain silent, by a statute authorizing a corporation to use a portion of its assets to establish and maintain the corporation's political action committee.

J.S. App. 53a.[13]

In this Court, appellants no longer argue that corporate financing of solicitation of employees to contribute to a separate segregated fund is unconstitutional on these grounds. Rather, they argue for the first time that a dissenting stockholder should receive some kind of a rebate for his or her share of the corporation's funds which may have been used to support political activity with which they may disagree. J.S. 20. Since this argument was not raised in the court of appeals, it

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[13] If the stockholders' claim is that corporate funds are being used improperly or improvidently by management and that the corporation (and its stockholders) are thereby suffering, then the appropriate remedy might be a stockholder derivative suit for *ultra vires* actions or breach of fiduciary duty. As this Court has recognized:

> Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intra-corporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.

First National Bank of Boston v. Bellotti, 435 U.S. at 794-95.

cannot be asserted in this Court. *Rogers* v. *Herman Lodge*, *supra*. Moreover, this claim is not ripe. The Act does not prohibit corporate rebates to dissenting shareholders, and there is no allegation in their complaint that any of the appellants has sought and been denied such a rebate. Indeed, there is not even any evidence as to how much corporate money has been spent to solicit executive and administrative personnel and there has been no suggestion as to how such a rebate might fairly be calculated. This Court should reject appellants' argument and summarily affirm the decision of the court of appeals.

CONCLUSION

The Commission submits that this Court should summarily affirm the decision below because the *en banc* court of appeals correctly decided the substantive issues raised, properly applying principles established by this Court.

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No. 82-284

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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OPPOSITION TO MOTION TO AFFIRM

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OPPOSITION TO MOTION TO AFFIRM

The FEC's proffered "question presented"—describing the ruling below as one upholding a Congressional decision "not to prohibit totally corporate solicitation of executive and administrative personnel"—grossly misreads a ruling that explicitly addresses three discrete constitutional questions. That ruling adjudicates a serious First Amendment issue concerning a statute under which vulnerable career employees are subjected to coercive methods of political solicitation by their employers. Another constitutional issue addressed below arises from the Congressional decision, when barring institutional spending by corporations and unions in federal elections, to limit unions to voluntary donations from their members yet to allow corporations not only to solicit stockholders but also to squeeze political payments from their vulnerable career employees. A final important

First Amendment issue arises from the ruling below that it was valid for Congress to authorize the spending of stockholders' assets to finance the corporate political fund without affording an objecting stockholder any protection against partisan use of his corporate assets.

The Commission's Motion to Affirm is most notable for its silence on our primary objection to the ruling below—its express rejection of the "compelling interest" standard (J.S. App. 26a-28a). Nowhere is there any answer to our specific demonstration (J.S. 14-18) that the court below thereby overlooked this Court's repeated rulings that where First Amendment rights are at stake "compelling interest," and not "substantial relationship," is the applicable standard. See, e.g., *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Citizens Against Rent Control* v. *Berkeley*, —— U.S. ——, 102 S.Ct. 434 (1982); *Abood* v. *Detroit Bd. of Education*, 431 U.S. 204 (1977); *Elrod* v. *Burns*, 427 U.S. 347 (1976). The strictest standard of review is surely applicable here, to measure statutory intrusion on rights of political abstention by corporate employees and stockholders and the equal treatment rights of labor organizations under election spending limitations imposed uniquely upon unions and corporations. There is eloquence in the silence of the Commission on the lower court's application of a diluted First Amendment review standard to statutory provisions that intrude directly upon fundamental political liberties.[1]

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[1] The Commission (Motion 10-11) contests the ruling below that appellants possess the requisite standing. But appellants' equal protection and stockholder claims undeniably present the requisite "real and palpable injury," for the union appellants assert that the discriminatory imbalance in FECA diminishes their political voice and the stockholder appellants contend that their First Amendment liberties are violated by application of their corporate assets to subsidize political activity which they oppose. And as to the violation of corporate employees' First Amendment rights, the court below properly found that the union plaintiffs have standing to complain—reasoning that corporate infringement on "employees' right of politi-

Moreover, as we next demonstrate, the Commission also fails to justify the constitutional infirmities of the statute excused by the court below under its diluted standard of review:

1. Coercive Means of Career Employee Solicitation. Far from seeking to preclude solicitation of career employees, our principal claim for their protection addresses the coercive means of solicitation to which they are being subjected. As the court below recognizes in a revealing quotation from the Congressional Record (J.S. App. 42a), it is probable that any employee solicited by his own employer "is going to be intimidated and coerced, because the entity soliciting the funds is . . . the one which also gives the salary raises and promotions." That is truer still of the career employee, who is entirely dependent on employer favor for his raises and promotions. And to the inherently coercive effect of such employer solicitations, there is added here the deliberate exploitation of career employee vulnerability by the use of supervisor solicitations, peer group meetings, and other compulsive methods of political fundraising. Though Congress never suggested that corporations could bring such suspect employment-related pressures to bear in soliciting their career employees, the permissive statutory construction below has just that effect, plainly rendering the

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cal abstention," if present, leads "to greater corporate PAC expenditures," causing "a relative diminution of the plaintiffs' political voices, which is one of the asserted injuries they seek to redress in this litigation" (J.S. App. 13a). The union appellants thus seek to remedy their own injury resulting from violation of corporate employees' constitutional rights, thereby meeting the requirement that there be "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct" (*Larson* v. *Valente*, —— U.S. ——, 102 S.Ct. 1673, 1680 (1982), quoting *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Authority*, 429 U.S. 252, 261 (1977)).

FECA constitutionally defficient by authorizing such employment-related coercion of vulnerable career employees.[2]

The FEC's only response to our First Amendment objections is to urge inappropriate "deference" to Congress in an area where the primary judicial deference must be to the First Amendment. The finding that "deference" is due the Congressional action rather than to First Amendment freedom reflects the erroneous rejection by the court below (J.S. App. 45a-47a) of the strict "compelling interest" First Amendment standard. As even the Commission has recognized, there is "a potential for coercion which is inherent in the employment relationship and which may be triggered by solicitation of employees by or on behalf of an employer" (*SUNPAC* Advisory Opinion 1975-23). Yet nowhere does the Court of Appeals suggest any possible compelling interest served by solicitation methods that exploit that potential for coercion. Every legitimate interest in permitting corporations to sponsor PACs can be served without authorizing liberty-eroding pressures that induce employee contributions from considerations of fear or favor. *In the absence of any compelling interest warranting FECA's*

[2] Nor does this Court's denial of review last term in our § 437g statutory challenge to coercive employer solicitation, contrary to the Commission's suggestion (Motion 13), have any bearing here. The critical facts documenting coercion were obtained by discovery in the present case and the three issues were certified under § 437h, not in the Commission proceeding that was the subject of the § 437g case. Indeed, the Commission's Opposition therein (p. 9, n.8) urged that the present facts were not then properly before the Court. As the ruling below makes clear (J.S. App. 35a, n.7), only after adverse disposition of the § 437g complaint were plaintiffs freed to argue under § 437h "that the solicitation the statute permits is rendered impermissible by the Constitution." Far from precluding review of the constitutional issues now presented, this Court's denial of review in the § 437g statutory proceeding occurred with full knowledge of the pendency of an appeal in the present constitutional case, which naturally subsumes the statutory construction issues.

authorization of the compulsive solicitation means demonstrated on the present record, the statute plainly violates the First Amendment by its failure to afford for the career employee the same arms length solicitation and donor anonymity protections that Congress properly assured for the hourly workers to forestall less than fully voluntary political payments.

2. The Unequal Limitation of Union Federal Election Spending. In the asserted interest of maintaining parity between business and labor, Congress extended to labor unions the long standing ban on corporate federal election spending; but with the recent FECA amendments authorizing corporations to squeeze political tribute from their employees, unions are far more severely curtailed than corporations in their ability to spend in federal elections. Whereas unions can obtain election funds only through voluntary member donations, corporations can obtain payments for election use not only from their stockholders but also from their vulnerable career employees. The masses of career employees of the nation's major corporations represent a potent source for corporate election funds that threaten to overwhelm the voice of labor under the more limited exception that Congress has allowed to unions. And the imbalance is rendered the greater by the lower court's refusal to bar the use of employment-related contribution pressures on such career employees.

The FEC's proffered justification for that statutory inequality—that Congress is not required to "equalize" the political strength of unions and corporations—repeats the flawed rationalization voiced by the lower court. If Congress had not barred unions and corporations from spending their funds in federal elections, no equality principle would come into play. But having forbidden unions and corporations to spend their institutional funds in

federal elections, Congress cannot constitutionally then provide a limited exception for unions permitting only members' donations while providing a double and potent escape for corporations freed to spend funds paid by both stockholders and vulnerable employees. In this context it is the unions who can claim the *Buckley* rule that the Commission would invoke against them (Motion 16), that Government may not "restrict the speech of some elements of our society" to enhance the voice of others.[3]

Nor is it an answer to the discriminatory statutory limitation of union election spending that career employees are "roughly comparable" to stockholders as the "beneficial owners" of the corporation. The legislative language to this effect reflected the more narrow House version of the 1976 Amendment (H.R. 12406), which would have permitted only a handful of corporate "executive officers" to be solicited rather than all middle management employees—engineers, professionals, plant, division and section heads—who were ultimately subjected to such solicitations (see J.S. App. 20a). Unlike "executive officers," who usually share in corporate profits, the vast numbers of middle management employees who have no such interest cannot tenably be regarded as if they were "beneficial owners" of the corporation "roughly comparable" to stockholders.[4]

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[3] The Commission again suggests, as it did below (Motion 15-16), that disparate treatment of unions and corporations in this vital First Amendment area is permissible because "the regulation of these different types of organizations need not be identical." That effort to escape the equal treatment requirement is answered by the lower court's own rejection of that same contention (J.S. App. 33a, n.72): "We do not conclude that corporations and labor unions are so dissimilarly situated that equal protection scrutiny may be avoided. Indeed . . . Congress considered them in many respects similarly situated."

[4] In pushing beyond stockholders to permit corporate solicitation of employees, the statute also transgresses the operative principle

In any event, the 1976 amendments create so gross an imbalance between the exception from the spending ban allowed unions in contrast to that afforded corporations, that the resulting deterioration in the political voice of labor cannot possibly survive the compelling interest standard of scrutiny that the court below should have applied. Indeed, that court nowhere suggests that the "roughly comparable" rationalization for extending corporate solicitation beyond stockholders to career employees could satisfy the strict constitutional standard. *No possible compelling interest has ever been suggested, and none exists, to justify a legislative scheme that in the name of parity between unions and corporations affords labor only a narrow crevice but provides corporations a gaping chasm to escape the statute's ban on institutional spending in federal elections.*

3. Political Use of Dissenting Stockholders' Assets. In construing the FECA to authorize the use of objecting stockholders' assets to pay the operating costs of the corporate political fund, the court below creates the First Amendment vice this Court wisely avoided in *Machinists* v. *Street*, 367 U.S. 740 (1961), and *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977), barring compulsory support for politics by an objecting union member. The First Amendment, we submit, equally bars such compulsory support by stockholders under the authority of this federal statute, which should properly be construed

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claimed by the FEC to justify union and corporate PACs. As the Commission states in its brief in No. 81-1506, *Federal Election Commission* v. *National Right to Work Committee* (p. 31) in the case of unions and corporations, acting as a surrogate for institutional spending, the statute "properly limits separate segregated funds to soliciting contributions only within the sponsoring organization, from those classes of individuals whose interest the corporate or union has a fiduciary obligation to represent." There could be no credible claim that the corporation has a fiduciary obligation to represent its middle level employees such as applies in the case of its stockholders, to say nothing of the fact that coercive solicitation of employees is the antithesis of the exercise of fiduciary responsibility.

to safeguard a stockholder's right to abstain by affording him an appropriate rebate or payment.[5]

The Commission echoes the lower court's overreading of *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), in its attempt to distinguish between the political liberty of the employees protected in *Street* and *Abood* and the political liberty of the stockholders denied by the ruling below. For unlike the issue in those two labor union cases and in the present case—the dissenter's right to abstain from financing the majority's political action—the issue in *Bellotti* was whether silencing the majority is justified for the protection of the minority. It was in that quite different context that this Court voiced the distinction between the mobility of the employee and that of the stockholder—the distinction upon which the Commission here principally relies. Moreover (as we demonstrated in our Jurisdictional Statement with no response by the Commission), so many American corporations now operate political funds and the number is growing so rapidly, that an objecting stockholder has little opportunity to transfer his assets to a corporation that will not use his money to operate a political fund. In terms of the numbers of such corporations, there are today more major American companies to which an employee could transfer his employment without any duty to pay union dues or agency fees than there are corporations to which a stockholder can transfer his assets to

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[5] The Commission (Motion 19-20) quibbles that no rebates to objecting stockholders were urged in the court below. But such payments are simply the practical means to secure the constitutional rights claimed below by the stockholder plaintiffs. The certified question resolved by the court below (see J.S. App. 8a-9a, n.11) asked whether the statute's authorization of the use of corporate assets for the cost of the PAC violates "the First Amendment right of a stockholder who objects to the use of his corporate assets for political purposes?" The issue we frame before this Court in terms of rebates is thus not a new issue, but merely the remedial consequence of the constitutional right of abstention from political support claimed below, upon which the Court of Appeals issued an adverse ruling.

avoid compulsory support of a political fund's costs. *There is thus every reason for review of a ruling that gives less constitutional protection from forced political exaction to the beneficial owners of the corporation than is afforded by this Court's rulings protecting the political abstention rights of unionized employees.*

* * * *

We note in conclusion that however this Court rules in *Federal Election Commission* v. *National Right to Work Committee*, No. 81-1506, the proper outcome here remains clear. If the Court should there determine that Congress, in the interest of confining institutional moneys in elections to funds derived from member-constituents, can deny the Right to Work Committee the right to solicit funds beyond its members, certainly the same interest here impugns funds solicited from mid-level employees who are in no way constituents of the corporation. If, on the other hand, this Court applies the "compelling interest" standard and finds that Congress may not forbid the Right to Work Committee to solicit outside its constituency, it is hard to see how under the same strict standard Congress may deny corporate employees and stockholders a full right to abstain from political action, and may impose more onerous restrictions on the political solicitation and spending rights of unions than those applying to corporations.

We urge that the Court note probable jurisdiction in this case.

Respectfully submitted,

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